Judgments of the Administrative Tribunal of the International Labour Organization:

79th Session
(May-July 1995)

International Labour Office
Geneva

Judgments
# of the Administrative Tribunal of the International Labour Organization:
79th Session
(May-July 1995)

International Labour Office
Geneva

ISSN 0378-7362

First published in 1995

Annual subscription: 65 Swiss francs

CONTENTS

Judgment No.

1421 Saunders v. ITU No. 9
1422 Saunders v. ITU No. 10
1423 Saunders v. ITU No. 11
1424 Goettgens v. EPO
1425 Schickel-Zuber v. CERN Nos. 2 and 3
1426 Qureshi v. FAO
1427 Sharma v. WHO No. 5
1428 Macchino Farías v. ESO No. 2
1429 El Mahjoub v. ILO No. 4
1430 Woollard v. IAEA
1431 Vollering v. EPO No. 4
1432 Aboo-Baker v. WHO
1433 McLean v. EPO
1434 Malhotra v. WHO No. 2
1435 Malhotra v. WHO No. 3
1436 Sala v. ITU No. 2
1437 Pary v. WIPO No. 3
1438 Ozorio v. WHO No. 5
1439 van der Peet v. EPO No. 19
1440 Ceribella v. EPO
1441 Sock v. UNESCO
1442 Rosé v. EPO
1443 Vollering v. EPO No. 6
1444 Moosai v. PAHO
1445 Kigaraba v. UPU No. 6
1446 Agoncillo, Colatosti, Gilland, Jacobsen, Palluel and Pappalardo v. WHO
1447 Berg v. EPO
1448 Perez-Venero v. UNIDO
1449 Hald v. WHO
1450 Kock, N'Diaye and Silberreiss v. EPO
1451 Hamouda, Kigaraba No. 5, Mjidou, Ranaivoson No. 2, Sebakunzi, Suprapto No. 2 and Tallon No. 2 v. UPU

1452 Wassef v. FAO No. 3
1453 Wassef v. FAO No. 4
1454 Wassef v. FAO No. 5
1455 Wassef v. FAO No. 6
1456 Belser, Bossung, Lederer, Riewald, Sarre, Strebel and Zimmer v. EPO
1457 Di Palma, Mossaz and Zotin v. WIPO
1458 Damond, Pautasso and Royles v. WIPO
1459 Hoebreck, Schwarz and Yossifov v. WIPO
1460 Derqué, Hansson No. 2, Ilardi, Makádi and Seinet v. WIPO
1461 Borrello and Chant v. Eurocontrol
1462 Drogoul, Roelofsen No. 2 and Sheehan v. Eurocontrol
1463 Weber v. EPO
Nindorera v. WHO (withdrawal)
Salard v. Eurocontrol (withdrawal)

LIST OF JUDGMENTS IN ALPHABETICAL ORDER

Aboo-Baker v. WHO: 1432
Agoncillo v. WHO: 1446
Belser v. EPO: 1456
Berg v. EPO: 1447
Borrello v. Eurocontrol: 1461
Bossung v. EPO: 1456
Ceribella v. EPO: 1440
Chant v. Eurocontrol: 1461
Colatosti v. WHO: 1446
Damond v. WIPO: 1458
Derqué v. WIPO: 1460
Di Palma v. WIPO: 1457
Drogoul v. Eurocontrol: 1462
El Mahjoub v. ILO No. 4: 1429
Gilland v. WHO: 1446
Goettgens v. EPO: 1424
Hald v. WHO: 1449
Hamouda v. UPU: 1451
Hansson v. WIPO No. 2: 1460
Hoebreck v. WIPO: 1459
Ilardi v. WIPO: 1460
Jacobsen v. WHO: 1446
Kigaraba v. UPU No. 5: 1451
Kigaraba v. UPU No. 6: 1445
Kock v. EPO: 1450
Lederer v. EPO: 1456
Macchino Farías v. ESO No. 2: 1428
Makádi v. WIPO: 1460
Malhotra v. WHO No. 2: 1434
Malhotra v. WHO No. 3: 1435
McLean v. EPO: 1433
Mjidou v. UPU: 1451
Moosai v. PAHO: 1444
Mossaz v. WIPO: 1457
N'Diaye v. EPO: 1450
Nindorera v. WHO (withdrawal)
Ozorio v. WHO No. 5: 1438

Palluel v. WHO: 1446
Pappalardo v. WHO: 1446
Pary v. WIPO No. 3: 1437
Pautasso v. WIPO: 1458
Perez-Venero v. UNIDO: 1448
Qureshi v. FAO: 1426
Ranaivoson v. UPU No. 2: 1451
Riewald v. EPO: 1456
Roelofsen v. Eurocontrol No. 2: 1462
Rosé v. EPO: 1442
Royles v. WIPO: 1458
Sala v. ITU No. 2: 1436
Salard v. Eurocontrol (withdrawal)
Sarre v. EPO: 1456
Saunders v. ITU No. 9: 1421
Saunders v. ITU No. 10: 1422
Saunders v. ITU No. 11: 1423
Schickel-Zuber v. CERN Nos. 2 and 3: 1425
Schwarz v. WIPO: 1459
Sebakunzi v. UPU: 1451
Seinet v. WIPO: 1460
Sharma v. WHO No. 5: 1427
Sheehan v. Eurocontrol: 1462
Silberreiss v. EPO: 1450
Sock v. UNESCO: 1441
Strebel v. EPO: 1456
Suprapto v. UPU No. 2: 1451
Tallon v. UPU No. 2: 1451
van der Peet v. EPO No. 19: 1439
Vollering v. EPO No. 4: 1431
Vollering v. EPO No. 6: 1443
Wassef v. FAO No. 3: 1452
Wassef v. FAO No. 4: 1453
Wassef v. FAO No. 5: 1454
Wassef v. FAO No. 6: 1455
Weber v. EPO: 1463
Woollard v. IAEA: 1430
Yossifov v. WIPO: 1459
Zimmer v. EPO: 1456
Zotin v. WIPO: 1457

The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against:

International Labour Organization, including the International Training Centre

World Health Organization (WHO), including the Pan American Health Organization (PAHO)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

International Telecommunication Union (ITU)

World Meteorological Organization (WMO)

Food and Agriculture Organization of the United Nations (FAO)

European Organization for Nuclear Research (CERN)

General Agreement on Tariffs and Trade (GATT)

International Atomic Energy Agency (IAEA)

World Intellectual Property Organization (WIPO)

European Organisation for the Safety of Air Navigation (Eurocontrol)

Universal Postal Union (UPU)

European Patent Organisation (EPO)

European Southern Observatory (ESO)

Intergovernmental Council of Copper-Exporting Countries (CIPEC)

European Free Trade Association (EFTA)

Inter-Parliamentary Union (IPU)

European Molecular Biology Laboratory (EMBL)

World Tourism Organization (WTO)

African Training and Research Centre in Administration for Development (CAFRAD)

Intergovernmental Organisation for International Carriage by Rail (OTIF)

International Center for the Registration of Serials (CIEPS)

International Office of Epizootics (OIE)

United Nations Industrial Development Organization (UNIDO)

International Criminal Police Organization (Interpol)

International Fund for Agricultural Development (IFAD)

International Union for the Protection of New Varieties of Plants (UPOV)

Customs Co-operation Council (CCC)

Court of Justice of the European Free Trade Association (EFTA Court)

Surveillance Authority of the European Free Trade Association (ESA)

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re SAUNDERS (No. 9)
(Application for review)

Judgment 1421

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1171 filed by Mr. Yann Harris Saunders on 29 July 1994, the reply of 26 January 1995 of the International Telecommunication Union (ITU), the complainant's rejoinder of 1 February and the ITU's letter of 8 March 1995 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. This is an application for the review of Judgment 1171 of 15 July 1992, in which the Tribunal ruled on Mr. Saunders' sixth complaint and by which it rejected his claim to the recalculation by the ITU of the amount of his salary to be taken into account for the purpose of determining his pension rights.

2. The complainant puts forward the following pleas for review of the judgment:

(1) The Tribunal committed a material error in holding that the dispute on which the judgment ruled turned mainly on whether he had been promoted to grade P.2 from G.7 or G.5. The point was relevant, he says, only to his subsidiary claims for redress.

(2) There was also a material error in holding that "The fact that the complainant continued to be paid the P.2 [special post] allowance, shows that he was merely to discharge the duties" of a P.2 post: in fact he was performing the duties of a permanent G.7 post.

(3) There was a material error in holding that he had had the benefit of Rule 3.4.2c).

(4) There was a further material error in holding that he could not object to the fact that his pensionable remuneration had not increased.

(5) The Tribunal failed to take into account certain facts and therefore came to wrong conclusions.

(6) New facts came to light in January 1995 which showed the ITU's failure to put the complainant on an equal footing with at least two other members of its staff.

3. In Judgment 442 (in re de Villegas No. 4) the Tribunal declared that its judgments carried the authority of res judicata and would be reviewed only in exceptional circumstances. It held to be inadmissible pleas for review: allegations of a mistake of law; a mistake in the appraisal of facts; failure to admit evidence; and failure to comment on a plea submitted by one or other of the parties. Other pleas in favour of review might, the Tribunal said, be allowed if they were such as to affect its decision. They include omission to take account of particular facts; a material error, i.e. a mistaken finding of fact which, unlike a mistake in the appraisal of the facts, involved no exercise of judgment; omission to pass judgment on a claim; and the discovery of a so-called "new" fact, i.e. a fact which the complainant had discovered too late to cite in the original proceedings.

4. The allegations of material errors in (1) to (4) above cannot amount to admissible pleas within the meaning of Judgment 442 but are mere attempts to reopen issues that were resolved in Judgment 1171.

5. Plea (5) does not even identify the facts the Tribunal has allegedly failed to consider.

6. Plea (6) relates to facts which go back several years and which he has failed to show that he did not know before January 1995.

7. The complainant's present pleadings contain a mass of repetitive arguments which he put forward in the context of his sixth case. They have no place in an application for review.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

P. Pescatore
P. Pescatore

Mark Fernando

ABGardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re SAUNDERS (No. 10) Judgment 1422

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 15 August 1994, the ITU's reply of 31 October, the complainant's rejoinder of 4 November and the Union's letter of 22 November 1994 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the Union has been summed up under A in Judgments 970, 989 and 1018. Like his earlier complaints this one arises out of his wish to make good the loss of earnings and of future pension entitlements due to his promotion from G.5 to P.2.

In a report on an appeal which he had lodged on 10 March 1992 against the reclassification of his post the Appeal Board of the ITU recommended that the Secretary-General should seek a "pragmatic solution" to his case. Having learned that a new post at grade G.7 in electronic publications might fall vacant, he asked the Secretary-General in a memorandum of 30 October 1992 to consider putting him on it in line with the Board's recommendation.

After seeing him in the presence of a legal officer and the chairman of the Staff Union, the Chief of the Personnel Department told him in a memorandum dated 20 November 1992 what pay and pension entitlements he might expect if the Secretary-General appointed him to a G.7 post. In a memorandum of 27 November to the Secretary-General he objected to the terms set out in the Chief's memorandum.

On 6 April 1993 the Union issued vacancy notice 12/93 for a post, No. S70/G7/135, in the Electronic Publications and Marketing Section. On 23 April the complainant lodged an application which he said did not imply consent to the "totally unacceptable" conditions in the memorandum of 20 November 1992. On 17 November 1993 the Chief of Personnel wrote to tell him that his application had not been successful.

In a memorandum of 30 November 1993 he asked the Secretary-General to review the rejection of his application. The Secretary-General upheld his decision in a reply dated 10 January 1994.

On 31 March 1994 he put his case to the Appeal Board, which recommended on 21 June that the original appointment, based on a recommendation from the Appointment and Promotion Board, should be "annulled"; that a new board "composed of members who hold a grade at least equivalent to that of the post" should reconsider the applicants; and that the rights of the successful one should be "protected".

In a memorandum of 21 July 1994 to the complainant the Secretary-General said he had decided to reverse the appointment he had made to post S70/G7/135 and to convene a new Appointment and Promotion Board to review all the applications that had been put to the earlier one. He promised he would advise the new board to make its recommendation on the strength of merit alone and would base his new decision entirely on that recommendation; if the complainant won, his conditions of employment would be determined according to the material rules and his "administrative and personal" situation. That is the decision under challenge.

B. The complainant submits that the rejection of his application for post S70/G7/135 shows two fatal procedural flaws.

One is that the Union "deliberately" infringed Staff Regulation 4.9 e), which requires that anyone taking part in a meeting of the Appointment and Promotion Board hold a grade "at least equal to that of the post under consideration".

Secondly, he charges the Administration with unlawfully rejecting his application because he had objected to the terms which the Chief of the Personnel Department "arbitrarily" imposed on any appointment he might get to a post at G.7. That amounted to sidestepping established procedure and putting him at a disadvantage before the Administration had compared him with others on merit.

He wants the Tribunal to set aside the impugned decision; to quash the successful candidate's appointment and order the Union to appoint him instead - with non-local status - at the highest step in the grade and with retroactive effect. Failing the quashing of the unlawful appointment, he claims (1) material damages including (a) payment of the difference in monthly earnings until retirement between his pay at grade P.2 and what he would have got at G.7 and (b) the reckoning of his pension entitlements on the basis of assignment to the G.7 post, and (2) moral damages in the amount of 50,000 Swiss francs. He seeks costs.

C. In its reply the ITU acknowledges that there was a flaw in the membership of the Appointment and Promotion Board. That is why the Secretary-General reversed his decision to appoint the other official and ordered a new competition. In any event a flaw of that sort did not warrant appointing the complainant without holding a new competition.

The Union denies that the Board took account of the complainant's failure to accept the terms the Chief of Personnel set out in the memorandum of 20 November 1992. That would have implied that the Chief of Personnel had made him a binding offer. But he had no authority to make such an offer, and his memorandum was merely informative.

The complainant's allegations of moral injury are unsubstantiated.

D. In his rejoinder the complainant presses his claims. He produces a message from the chairman of the Appointment and Promotion Board explaining that it had decided to put his name on the short list only if his application was "unconditional", i.e. without reservations about the terms set out by the Chief of Personnel. He says the Union is determined to keep him at P.2 by any means, "fair or foul".

CONSIDERATIONS:

1. On 23 April 1993 the complainant, a grade P.2 official of the ITU, applied for a vacant post at grade G.7, No. S70/67/135. He stated that his application should not be construed as acceptance of terms which the Chief of Personnel had set out in a memorandum of 20 November 1992. Those terms were that, if he was appointed to the post, his step in grade G.7 would be so determined that his net pay and allowances would be at least equal to the sum of his net base salary and post adjustment allowance, reckoned at the single rate, at his then step and grade, step 12 in P.2. The Chief of Personnel had estimated that he would be put at step 7 in G.7, which

would mean an increase of some 905 Swiss francs in his annual take-home pay. And he would revert to the local status which he had had as a member of the General Service category of the staff.

2. The complainant's name was not on the short list considered by the Appointment and Promotion Board and the Administration told him in a memorandum of 17 November 1993 that his application had not been successful. The Secretary-General having refused to intervene, he appealed. The Appeal Board accepted his contention that the Appointment and Promotion Board had been improperly constituted because, contrary to the requirement in Staff Regulation 4.9 e), one of the Board's members had not held a post at a grade at least equal to that of the vacancy.

3. By the decision now impugned the Secretary-General reversed the decision he had taken earlier on the recommendation of the Appointment and Promotion Board and directed that the Board be reconvened, consider all applicants whose names had been transmitted by the preselection panel, make its recommendation only on the merits of the applicants, and abstain from considering any other element which might be brought to its knowledge, including the Chief of Personnel's memorandum of 20 November 1992 to the complainant.

4. The complainant is asking the Tribunal:

(a) to quash the Secretary-General's decision;

(b) to quash the appointment to the post and appoint the complainant instead without holding a new competition;

(c) to order the ITU to "calculate the complainant's new pay at G.7" upon such appointment "at the same step he reached at P.2";

(d) to order it to maintain his non-local status;

(e) to order it to make the adjustment of his salary retroactive;

(f) alternatively, to award him the material and moral damages set out in B above;

(g) to award him costs.

5. In putting his case to the Appeal Board and to the Tribunal the complainant has seen fit to file voluminous memoranda relating to previous disputes about his pay, which is expressed in United States dollars and which he says is lower, because of the declining value of the dollar against the

Swiss franc, than his earnings would have been had he remained in the General Service category. Those issues are irrelevant to this case, the sole material point being whether the impugned decision infringed his rights under the Staff Regulations.

6. The complainant has utterly misconceived the issues arising from the Secretary-General's decision. The appointment of another applicant having already been reversed, the question of quashing that appointment does not arise. As to the complainant's claim that he be appointed instead, the Secretary-General's decision that the Appointment and Promotion Board proceed de novo was fully justified, that being a matter at the Secretary-General's discretion. The Tribunal has already ruled in Judgment 988, in which it dismissed Mr. Saunders' second complaint, that Regulation 4.9 allows the Secretary-General to promote someone even against the Appointment and Promotion Board's advice and is intended as a safeguard to ensure compliance with the rules on appointment and promotion. The intent is not to enable the Secretary-General to prefer a weaker candidate on compassionate or indeed any other grounds. The complainant's principal claim to the quashing of the impugned decision and his alternate claims to material and moral damages therefore fail. That being so, the other claims to relief, which are consequential, must fail as well.

7. The complainant has asked the Tribunal to hear evidence from two witnesses, whom he names, about an alleged former breach by the Appointment and Promotion Board of the requirement that members of the Board hold a grade at least equal to that of the vacancy. Since the Secretary-General has accepted the Appeal Board's finding that the Appointment and Promotion Board was improperly constituted and has reversed his earlier decision, no useful purpose would be served by hearing the witnesses.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

P. Pescatore
P. Pescatore

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re SAUNDERS (No. 11) Judgment 1423

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 3 September 1994, the ITU's reply of 10 October, the complainant's rejoinder of 25 October and the Union's letter of 28 November 1994 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career at the ITU appears under A in Judgments 970, 989 and 1018. This dispute, like those which led to earlier complaints, is about his loss of earnings and potential loss of pension entitlements due to the promotion he got on 1 January 1986 from grade G.5 to P.2.

By service order No. 24 of 15 December 1993 the Secretary-General amended the salary scales of staff in the General Service category as from 1 January 1991.

In a memorandum of 13 January 1994 the complainant asked the Secretary-General to review the new scales on the grounds that they aggravated the loss of pay and pension entitlements he had suffered on account of his promotion to P.2. He sought financial compensation as from 1 January 1991 and, failing that, leave to put his case directly to the Tribunal.

By a memorandum of 25 February 1994 the Secretary-General told him that the service order had no effect on the terms of his employment as a member of the Professional category of staff. The Secretary-General accordingly rejected the request for review and for waiver of the obligation to go through the internal appeal procedure.

On 4 May the complainant put the matter to the Appeal Board, which, though it did not regard his appeal as receivable, recommended in a report dated 5 July 1994 that the Administration should do its utmost to find a "practical solution".

By a memorandum of 20 July 1994 the Secretary-General upheld his earlier decision and said he had asked everyone concerned to try to find a practical solution. That is the decision under challenge.

B. The complainant submits that the impugned measure impairs his acquired rights under Staff Regulations 3.15 and 12.1, which read:

> "Regulation 3.15 - Pensionable Remuneration:
>
> Pensionable remuneration shall, without prejudice to the conditions of engagement of the staff member, consist of the amount calculated in accordance with the provisions of the Regulations of the United Nations Joint Staff Pensions Fund."
>
> "Regulation 12.1 - General Provisions:
>
> These Regulations may be supplemented or amended by the Administrative Council, without prejudice to any conditions of service quoted in the letter of appointment or contract of individual staff members ..."

The acquired right he is asserting is to a pension no lower than what he would have got at G.5, his former grade. Though he accepted promotion to P.2 on the understanding that his pension would decline no further the amount of it has fallen despite Rule 3.4.2, which is supposed to safeguard pension rights on promotion from the General Service to the Professional category. By applying the new scales of pay and pensionable remuneration to all General Service staff but not to him the Secretary-General has acted in breach of equality of treatment and good faith.

He puts his present losses at about 2,000 Swiss francs a month. By overlooking such essential facts the Secretary-General failed to discharge his duty of care.

The complainant wants the Tribunal to quash the Secretary-General's decision of 20 July 1994; to alter his salary and pensionable remuneration as from 1 January 1991 to the figures he would have been entitled to at G.5; either to order the Union to reckon his pay at a "fictitious step" so that it squares with successive promotions from G.4 to P.2 or, failing that, ensure that his take-home pay is 50 per cent greater than the figure corresponding to step 12 of grade G.4; compensate him for the loss of any amounts he should draw in pension below the G.5 level; order the ITU to reckon his and its own contributions to the pension fund as from 1 January 1994 at step 12 of grade G.5 or at step 12 of P.2, whichever carries the higher pensionable remuneration; order an "undertaking in principle" from the ITU on his claim to financial redress "but leave open the option to have what would have been his pension entitlements at G.5 converted into compensation if the impugned decision does ... cause him the suspected injury"; order the ITU to pay him on retirement the difference between his pension as a P.2 official and what he would have got at G.5; let him come back to the Tribunal in due course "to have his entitlements determined and his rights enforced"; and order the Secretary-General to "put an end to the penalty" he has suffered since 1987.

C. In its reply the Union contends that the complaint is irreceivable. Since, as the Tribunal has held, the complainant belongs to the Professional category, the change in the conditions of employment of General Service staff has caused him no injury. So he has no cause of action.

The issues which he raises, and which he has indeed argued in his ten earlier complaints, are res judicata. For example, the Tribunal has already held that the ITU properly determined his entitlements upon promotion from G.5 to P.2 without allowing for "hypothetical" grades in between. His alleged loss of earnings and pension rights is based on "unwarranted extrapolation" and "pure conjecture".

D. In his rejoinder the complainant denies that his complaint is res judicata: the Tribunal has yet to entertain a plea from him that the General Service pay scales caused him "additional" injury. For advancement by six grades to entitle him to a figure of pay 13 per cent lower and to pensionable remuneration 41 per cent lower offends against the principles of equal and fair treatment and good faith; his pay should have been 70 and his pensionable remuneration 114 per cent greater.

CONSIDERATIONS:

1. The complainant is impugning the Secretary-General's final decision of 20 July 1994. It confirms the Secretary-General's refusal of 25 February 1994 to review his decision of 15 December 1993 introducing revised salary scales for the General Service category of staff of the ITU. The complainant's substantive grievance is that if he had not been promoted in 1986 from that category to a grade P.2 post he would have had better pay and pension entitlements under the revised scales than he has at P.2. He asks that his salary and pension entitlements be retroactively increased.

2. The complainant is not a member of the General Service category of staff but holds a post in the Professional category. He submits that the Secretary-General's decision aggravates the deterioration of his pensionable remuneration and that "the injury sustained by the complainant on application of the new pensionable remuneration for G staff might increase because of ulterior decisions". He explains that his case does not rest on breach of any term of his contract or of any provision of the ITU's Staff Regulations and Rules. He contends that the impugned decision impairs his acquired rights to a pension at least equal to the one he would have received at G.5, the grade he held at the time of promotion to P.2. He observes that Staff Regulation 3.15 provides that "Pensionable remuneration shall, without prejudice to the conditions of engagement of the staff member, consist of the amount calculated in accordance with the provisions of the Regulations of the United Nations Joint Staff Pension Fund". He maintains that his "conditions of engagement" were those of the General Service category and that Rule 3.4.2 was supposed to prevent deterioration of his pensionable remuneration.

3. As the Tribunal observed under 3 in Judgment 1303, by which it dismissed Mr. Saunders' eighth complaint, Article II, paragraph 5, of its Statute confers on it competence to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of such provisions of the Staff Regulations as are applicable to the case. Moreover, as the Tribunal affirmed in Judgment 764 (in re Berte No. 2) under 4, "A decision by an international organisation is challengeable before the Tribunal only if it causes the complainant injury".

4. In Judgments 1093, on Mr. Saunders' third complaint, and 1171, on his sixth, the Tribunal ruled on the issue of his pay and pension entitlements on promotion and held that the figures corresponded to his grade, P.2. He therefore has no locus standi in challenging any new salary scales applicable to the General Service category of staff. Because he belongs to another category of staff the revision of those scales cannot cause him injury. His claim to compensation is unfounded because he has suffered no injury on account of the Secretary-General's decision.

5. By his pointless repetition of arguments on claims which the Tribunal has rejected in previous complaints the complainant has refused to accept that the decisions of the Tribunal are res judicata. His conduct in reverting to issues which the Tribunal has already ruled on amounts to an abuse of process. His complaint is devoid of merit and will be dismissed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

P. Pescatore
P. Pescatore

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re GOETTGENS

Judgment 1424

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Johannes Karl Wilhelm Goettgens against the European Patent Organisation (EPO) on 3 May 1994 and corrected on 16 May, the EPO's reply of 11 August, the complainant's rejoinder of 4 September and the Organisation's letter of 21 September 1994 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German citizen born in 1928, joined the EPO in 1979 and at the material time held a post as director at grade A5.

In notes dated 20 December 1991 and 8 January 1992 he applied to the Director of Personnel for early retirement for reasons of health as from 1 March 1992. By a letter of 20 January 1992 the Director of Personnel granted his application on behalf of the President of the European Patent Office, the EPO's secretariat.

In a medical certificate dated 13 February 1992 his doctor declared him unfit for work for a period of four weeks. In a letter of the same day to the Director of Personnel he asked to have his retirement put off until the end of March so that he could finish the staff reports on his subordinates which poor health had prevented him from writing. On 17 February the Director of Personnel told him that the start of his retirement could not be changed.

In a letter of 26 February he informed the President that since his doctor had found him permanently unfit for work he wanted to have his case put to the Invalidity Committee under Article 90 of the Service Regulations; he was therefore withdrawing his application for early retirement.

In a reply dated 13 March the Director of Personnel said that the President was unwilling to put off the date of retirement, and he supplied a certificate of 19 February 1992 from the President attesting that the effective date was 1 March 1992.

On 29 May 1992 the complainant lodged an appeal with the Appeals Committee objecting, among other things, to the Administration's refusal to follow the invalidity procedure and to its decision of 13 March. In a report of 4 January 1994 the Committee, while regretting the vagueness of the rules on the invalidity procedure, recommended rejecting his appeal. By a letter of 4 February 1994, which he impugns, the Director of Staff Policy told him that the President had endorsed the Committee's recommendation.

B. Relying on Article 84 of the Service Regulations, the complainant submits that the Administration should have applied the invalidity procedure. Although he was close to retirement he was still a staff member when it became plain that his incapacity was permanent.

Staff members are, on application, entitled under Article 90(2) to have their case put to the Invalidity Committee. By denying him the invalidity procedure the President unlawfully replaced the Committee's appraisal with his own and that was in breach of the complainant's rights.

The EPO's insurance company should have paid him the amount due under Article 84 in the event of invalidity.

He wants the Tribunal to (1) quash the decision of 4 February 1994; (2) award him, plus interest, the amount to which he is entitled under Article 84(1) b) of the Service Regulations as in force up to 10 June 1983 and under Article 11 of the Organisation's Collective Insurance Contract; (3) have his retirement pension converted into an invalidity pension in keeping with Article 14(2) or, alternatively, 14(1) of the Pension Regulations; and (4) grant him compensation for the difference in pension, plus interest, for the period from 1 March 1992 up to the date of payment of the invalidity pension.

C. In its reply the EPO contends that his third claim is irreceivable because it did not form part of the internal proceedings.

His other claims are devoid of merit. Article 13 of the Pension Regulations requires assessment of a staff member's invalidity while he is still serving. Besides, it follows from Articles 62(6), 62(7) and 90(1) of the Service Regulations that the official must have been on sick leave for 12 months in the last three years. Between March 1989 and March 1992 - when he retired - the complainant's sick leave came to a total of only 195.5 days; so he does not qualify for an invalidity pension. Nor is he entitled to payment of the Article 84 benefit.

Far from declaring him permanently disabled the medical certificate of 13 February 1992 merely put him on four weeks' sick leave. He has never submitted any evidence to bear out his allegations of invalidity.

D. In his rejoinder the complainant observes that he has withdrawn his application for early retirement and that twelve months' sick leave is not required before the Invalidity Committee may meet.

CONSIDERATIONS:

1. The complainant joined the staff of the EPO in 1979. His health, which had been poor since 1989, grew worse in December 1991, and he wanted to retire as from 1 March 1992. The Director of Personnel asked him to confirm his wishes in writing, and he did so on 8 January 1992. On 20 January the Director of Personnel acknowledged receipt of his application and granted it on behalf of the President of the European Patent Office. On 13 February a doctor saw him and gave him a certificate declaring him unfit for work for four weeks. The same day he asked the Organisation to defer the start of his retirement until the end of March to allow him to complete unfinished staff reports. But in a reply of 17 February the Administration refused and confirmed his retirement at 1 March. On 26 February he again wrote to the President expressing dismay at the refusal and asking to have his case referred to the Invalidity Committee under Article 90 of the Service Regulations; he also said that if his invalidity was not acknowledged he would withdraw his application for early retirement. The EPO held to the original date of retirement and saw no reason to convene the Invalidity Committee. He thereupon lodged many claims with the Appeals Committee, though he dropped some of them as the proceedings continued.

2. The Appeals Committee concluded that the dispute arose out of the EPO's refusal to apply the procedure for assessing invalidity and to acknowledge the complainant's right to an invalidity pension instead of his retirement pension. Though it expressed regret about the inadequacy of the rules, it recommended rejecting his claims. The President confirmed his earlier decision by another of 4 February 1994. The complainant seeks the quashing of it, the conversion of his retirement pension into an invalidity pension, and payment of various amounts he regards as entitlements.

3. On the evidence the Tribunal is satisfied, as was the Appeals Committee, that the EPO did not infringe any procedural or substantive rule by refusing to put his case to the Invalidity Committee and denying him invalidity benefit under the material rules.

4. The first point is that it was proper for the EPO to set the date of his retirement at 1 March 1992 as he had himself asked. Indeed that seems no longer to be at issue since he waived his claim in his appeal to the Appeals Committee to be kept on until the end of the invalidity procedure.

5. It was proper, secondly, to treat him as having retired under Article 54(1) at his own request rather than under 54(2) on the strength of a finding of total permanent invalidity by the Invalidity Committee.

6. Thirdly, the EPO was under no duty to put the matter to the Invalidity Committee and was, in the circumstances of the case, free to turn down his request that it do so.

7. Article 90 reads:

> "1. The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave provided for in Article 62, paragraph 6, of these Regulations, and for determining, for the purposes of these Regulations and of the Pension Scheme Regulations, whether a permanent employee is suffering from permanent invalidity which prevents him from performing the duties attaching to his employment at the Office.
>
> It shall also be competent to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner.

> 2. Cases shall be submitted to the Invalidity Committee either on the initiative of the President of the Office or at the request of the permanent employee concerned."

8. There are no implementing provisions. That may be a pity and may indeed account for the dispute since the complainant believes he has a right under the article to put his case to the Committee with or without the Organisation's consent. What is required is a reasonable construction of the rule that heeds the rightful interests of staff and Organisation alike. For that purpose a distinction is to be drawn between the Invalidity Committee's sundry responsibilities under 90(1). When an official's accumulated total of sick leave goes over the limit in Article 62(6) of the Regulations - namely 12 months within any period of three years - the case will go to the Committee whether it is the President of the Office or the official who refers it. Moreover, since the Committee is competent to determine whether there is such permanent disability as to render unfit for work the official may undoubtedly apply for it to take up the case, provided that the application has substance and in particular unfitness is proven. Lastly, though the Committee is also competent in any dispute over matters of medical opinion, there must nevertheless be a genuine dispute over the official's rights to an invalidity pension.

9. The complainant was not granted more than a total of 12 months' sick leave within three years. He did not ask for a meeting of the Invalidity Committee until 26 February 1992, i.e. three days before going on retirement at his own request, and he had nothing more than a doctor's certificate saying he was unfit for work for four weeks from 13 February. It was not open to him, so near the date of departure, to plead unfitness for duties that were to end anyway the very day after the Administration got his request. Nor did he show that there was a dispute over any medical opinion warranting an application from him for an invalidity pension. True, later certificates declared him unfit for work for further periods in which he was no longer on the Organisation's staff. And in November 1992 the German pension scheme to which he belongs - because he worked in his national civil service before secondment to the EPO - put his disability at 30 per cent. But neither of those facts afforded any grounds for referral of the case to the Invalidity Committee.

10. The conclusion is that it was lawful for the EPO both to grant the complainant a retirement pension at his own request and to refuse to put his case to the Invalidity Committee, and there is no evidence before the Tribunal to support his claim to an invalidity pension. So his claims fail in their entirety, there being no need to rule on the Organisation's objections to the receivability of that one in particular.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot Mella Carroll

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re SCHICKEL-ZUBER (Nos. 2 and 3) Judgment 1425

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Daria Schickel-Zuber against the European Organization for Nuclear Research (CERN) on 17 February 1994 and corrected on 22 April, CERN's reply of 27 July, the complainant's rejoinder of 14 October and the Organization's surrejoinder of 16 December 1994;

Considering the third complaint filed by Mrs. Daria Schickel-Zuber against CERN on 22 April 1994, CERN's reply of 27 July, the complainant's rejoinder of 14 October and the Organization's surrejoinder of 16 December 1994;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found under A in Judgment 1212 of 10 February 1993 on the complainant's first case. She joined CERN on 4 February 1991 and on 4 March was granted a three-year appointment as a secretary in the Director-General's office. The confirmation of her appointment was subject to six months' probation. On 26 April 1991 she was taken ill at work and has since been unable to resume duty. On 28 June the head of the Director-General's office and the Adviser to the Director-General wrote an adverse report on her performance. On 12 November the Leader of the Personnel Division informed her that her appointment was to end on 31 January 1992. The Tribunal quashed that decision in Judgment 1212 and reinstated her in her contractual rights. It said: "If she cannot go back to work the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons".

On 7 January 1992 the complainant had asked the Director-General to recognise that her illness was service-incurred. In a medical opinion of 14 April CERN's medical adviser stated that it was not. Challenging that opinion, the complainant applied to the Director-General in a letter of 30 April for medical arbitration in accordance with point 17 of circular 14 of April 1988. Failing agreement on the appointment of an expert, the complainant asked the Director-General on 8 October 1992 to name one. He named a psychiatrist, Professor A. Raix, on 19 February 1993 after consulting the Joint Advisory Rehabilitation and Disability Board. In a letter of 5 March to the Leader of the Personnel Division the complainant expressed strong objections to the choice.

In accordance with Judgment 1212 and by a letter of 12 March 1993 the Director of Administration informed the complainant that she was reinstated and must undergo a medical examination before being given a new assignment.

On 22 June the Leader of the Personnel Division referred the matter to the Disability Board in accordance with Regulation R II 4.16 of the CERN Staff Regulations. Under that Regulation the Director-General decides after consulting the Board whether or not to "retain" someone who has had a total of 24 months' sick leave in 36 months.

By a letter of 19 July 1993 the Director of Administration informed the complainant that her appointment, which was to expire on 3 March 1994, was extended by three months pending the findings of the medical examination for the "sole purpose" of letting her finish probation "if necessary and if possible". In a letter of 17 September 1993 the complainant pointed out to the Director that if she proved satisfactory she would be entitled at the very least to work out her appointment.

In his report of 26 October to the Leader of the Personnel Division the medical expert concluded that the complainant's illness was not service-incurred and that "the remaining functional capacity and the type of activity possible cannot be defined since there has been no consolidation [of the illness]". By a letter of 1 November the Leader of the Personnel Division informed the complainant of the Director-General's decision not to treat her illness as service-incurred.

By a letter of 24 November, which is the first decision she impugns, the Director of Administration notified to her the Director-General's decision not to extend her appointment beyond 3 June 1994. By a letter of 1 December 1993 to the Director she objected to that decision on the grounds that it was inconsistent with Judgment 1212.

By a letter of 8 December 1993 to the Director-General she applied under point 18 of circular 14 for referral to the Disability Board of the question as to whether her illness was service-incurred. The Board made two recommendations in two reports of 17 February 1994: to let her go after the expiry of her appointment because of the state of her health and to confirm the Director of Administration's decision of 1 November 1993. By a letter of 15 March 1994 the Director of Administration informed the complainant of his decision to endorse the Board's recommendations as to the origin of her illness. On the same date he also informed her that she would not be kept on after 3 June 1994. That is the second decision she is impugning.

On 31 March the complainant lodged an internal appeal against the Director of Administration's decision of 15 March 1994 not to treat her illness as service-incurred.

On 14 April, in accordance with Regulation R II 4.20 of the Staff Regulations and Article II 4.02 of the Rules of the Pension Fund, the two medical advisers of CERN established the complainant's unsuitability within the meaning of Article II 4.01 of the Pension Fund Rules, which confers entitlement to a pension for unsuitability.

B. The complainant objects to the termination of her appointment on grounds of unsatisfactory work, whether it derives from the decision of 24 November 1993 or that of 15 March 1994. She has three pleas.

First, CERN disregarded res judicata. The decision in the letter of 24 November 1993 rests solely on the complainant's performance, declared unsatisfactory in the staff report of 28 June 1991, though she has been unable to go back to work since falling ill. Judgment 1212 meant that if CERN decided to end her appointment it was bound to do so on the grounds of incapacity for medically certified reasons. It not only terminated her without awaiting the outcome of the proceedings to determine the nature of her illness, but gave a reason different from the one required by the Tribunal.

Secondly, she submits that the reason given for her dismissal, namely that her work was unsatisfactory, is unsound. She cites a general principle, which she says the Tribunal's case law bears out, that an organisation may not on any but medical grounds end the appointment of someone who is on sick leave. What is more, CERN was unable to assess her work, as the Director of Administration expressly acknowledged in his letter of 24 November 1993. The staff report of 28 June 1991, on which the impugned decision relied, was not drawn up by the competent authority, rested on blatant misappraisal, overlooked essential facts and was the outcome of a flawed procedure.

Thirdly, the decisions of 24 November 1993 and 15 March 1994 are unlawful. The former was taken while the Disability Board was still discussing whether or not to "retain" her. Yet under Regulation R II 4.16 the Director-General may not take a decision until he has had the Board's opinion. If the Tribunal were to treat the letter of 15 March 1994 as the impugned decision CERN would have failed to give the six months' notice required in Regulation R II 6.02 of non-renewal of a fixed-term appointment.

The complainant submits that the decision not to end her appointment for certified medical reasons has caused her serious material injury because it deprives her of a pension for incapacity and of full social coverage. She asks the Tribunal to quash the impugned decision; order CERN to let her finish probation by reinstating her or, failing that, to grant her proper redress; and award her moral damages and costs.

C. In its reply the Organization submits that the complainant's third complaint is irreceivable. The decision of 15 March 1994 confirms the one of 24 November 1993 and so is a mere "procedural formality". In any event the complainant failed to exhaust the internal means of appeal against the decision of 15 March 1994.

On the merits CERN maintains that it did execute Judgment 1212 properly. The Tribunal's intention was that the complainant should get social coverage under the material rules. The medical enquiry established that her illness was not service-incurred. Under Articles II 3.01 and II 3.02 of the Rules of the Pension Fund payment of an incapacity pension could be made only in the event of dismissal for medically certified incapacity if her illness was consolidated. But it was not. As to the pension for unsuitability, provided for in section 4 of the same Rules, according to Article II 4.04 it does not apply in the event of dismissal for medically certified incapacity. Dismissing the complainant on such grounds amounted to denial of social coverage.

CERN rejects the complainant's objections to the lawfulness of the grounds for the decision of 24 November 1993. It was not a decision to dismiss her but a decision not to renew her appointment. In Judgment 1149 (in re Baillod) the Tribunal held that a staff member's appointment may end while he is on sick leave. What led the Director-General to take the decision of 24 November 1993 was the lack of any prospect of her going back to work, since she had been on sick leave since 26 April

1991. CERN also rejects the plea that the staff report of 28 June 1991 was unlawful.

It denies breach of due process in reaching the decision of 24 November 1993: it was not a decision about whether to keep her on and so it called for no consultation of the Disability Board. The procedure intended to determine whether to keep her on became a mere formality once it had been decided not to renew her appointment. The requirement of notice does not apply to a decision, like the one of 15 March 1994, whether to keep someone on.

The decision not to dismiss her on grounds of medically certified incapacity caused her no material injury: she has been granted a pension for unsuitability, over and above all the other moneys she has been paid, in return for only 12 weeks' actual work.

D. In her rejoinder the complainant points out first that she was entitled anyway as a staff member to most of the sums CERN mentions. The Tribunal's ruling that if she was dismissed it should be for medically certified reasons was actuated by considerations of elementary compassion.

She presses her pleas about breach of due process and breach of res judicata. Neither the decision of 24 November 1993 - to dismiss her for professional incompetence - nor the one of 15 March 1994 - confirming that her appointment ended by virtue of non-renewal - squares with Judgment 1212. If the implied reason for the decision of 15 March 1994 was medically certified incapacity, CERN should have acted accordingly and granted her a pension not for unsuitability, but for incapacity. The only criterion for distinguishing between incapacity and unsuitability is the circumstances in which an appointment is terminated. In any event an illness which is sufficiently consolidated to prevent someone from returning to work is bound to warrant the grant of a pension for incapacity.

E. In its surrejoinder CERN maintains that it was unable to end her appointment lawfully on grounds of medically certified incapacity without depriving her of entitlement to any kind of pension, since according to the medical expert's report of 26 October 1993 her illness was not consolidated.

CONSIDERATIONS:

1. The complainant joined the staff of CERN on 4 February 1991 as a secretary in the Director-General's office. After one month's trial CERN gave her a fixed-term appointment for three years from 4 March 1991, the first six months to be probationary. On 26 April 1991 she fell ill at work and went at once into hospital. Being unable to return to work, she was put on unlimited sick leave. In July 1991 she learned that the Administration had extended her probation to 31 January 1992, when her future with the Organization would be decided. CERN's medical officer examined her on 9 August 1991. She was given notice on 12 November 1991 of the decision to dismiss her at 31 January 1992. In Judgment 1212 of 10 February 1993 the Tribunal set aside that decision on procedural grounds. It said under 7:

> "Even though the usual period of probation has expired, the Tribunal will in the circumstances set the decision aside so that the proper procedure may be followed. She is reinstated in her contractual rights and shall be entitled to complete the probation period in some new assignment. If she cannot go back to work the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons.
>
> In any event she is entitled to 10,000 Swiss francs in damages for moral injury and, since she succeeds, to 4,000 francs in costs."

2. The Director of Administration of CERN thereupon reinstated her so that she might "finish probation". He explained that she was entitled to do so on some new assignment but that the Administration could not identify any until she had undergone medical examination. Actually she never went back to work at CERN and it is common ground, for all the procedural issues that arose over the enquiries by medical experts, that she was unable to do so. CERN took three sets of decisions, and they must be distinguished if the material issues are to be properly grasped.

3. First, since she had asked that her illness be treated as service-incurred, the Leader of the Personnel Division informed her by a letter of 1 November 1993 that the Director-General had decided, on the strength of the findings by the expert appointed to consider that request, that her illness was not service-incurred. After consultation of the Joint Advisory Rehabilitation and Disability Board the Director of Administration confirmed that decision on 15 March 1994.

4. Secondly, the Director decided on 19 July 1993 to extend her fixed-term appointment, which was to run out on 3 March 1994, by three months to let her finish probation and have the findings of the medical enquiry then underway. On 24 November 1993 he told her that her appointment could not be extended or renewed and so would expire at the scheduled date, 3 June 1994.

5. Thirdly, her case was put to the Disability Board on 22 June 1993 under Staff Regulation R II 4.16. That provision empowers the Director-General to decide after consulting the Board whether to "retain" a staff member - like the complainant - who had had 24 months' sick leave in 36 months. The Board at first said that it had no objection to her staying on pending the findings of the medical enquiry; then, on 17 February 1994, it recommended against the Director-General's renewing her appointment on the grounds that she would not be fit to go back to work before her contract expired. On the strength of that recommendation the Director of Administration told her on 15 March 1994 that she would not be kept on after 3 June 1994.

6. She is objecting both to the decision of 24 November 1993 and to the one of 15 March 1994 though she doubts that the latter is really a decision and says she is impugning it ex abundante cautela. The submissions being common, the Tribunal will join the two complaints.

7. The complainant contends that, whichever decision is impugned, the refusal to renew her appointment is at odds with what the Tribunal ruled in Judgment 1212 and that it shows a mistake of law and several procedural flaws.

8. Her first plea, then, is that there was breach of res judicata on the grounds that CERN refused renewal before completing the procedure to determine whether her illness was service-incurred and that the reason it gave for ending her contract was not the one the Tribunal mentioned. Her arguments fail for the following reasons.

9. Judgment 1212, on which she relies, restored her contractual rights by quashing the unlawful dismissal. But it did not confer on her any rights beyond those she derived from her contract. Since the contract was for a fixed term CERN had no duty either to convert it into a permanent one or to extend it until she was fit to go back to work. The judgment said she was entitled to finish probation on a new assignment, and CERN's obvious intention in extending her appointment to 3 June 1994 was to let her have one last opportunity of finishing her probation, which should have been for six months but which her illness had interrupted on 26 April 1991. It thereby discharged its obligation to let her finish probation.

10. The judgment said that if she could not go back to work "the procedure must be followed for determining whether her illness was service-incurred and whether she may be dismissed for certified medical reasons", and on the strength of that she argues that when the decision of 24 November 1993 was taken the procedure for determining the "nature" of her illness was not yet over. It is true that CERN had decided as early as 1 November 1993 that her illness was not service-incurred, she had challenged its decision, and the Organization did not confirm it until 15 March 1994. But CERN did not preclude the possibility of keeping her on: as was said in 5 above, it referred her case to the Disability Board under Regulation R II 4.16. And it was on 15 March 1994, the very day that it decided not to treat her illness as service-incurred, that the Director of Administration refused to extend her appointment beyond the date of expiry. So her plea on that score cannot be sustained. Nor was CERN wrong to decline to dismiss her on grounds of incapacity. That particular outcome, which Judgment 1212 contemplated, was possible only while she was under contract. Once her appointment had expired dismissal was out of the question, and of course Judgment 1212 did not require CERN to keep her on after expiry of the appointment so that it might dismiss her.

11. The second strand to her plea about res judicata is that CERN gave a reason for termination other than the one the Tribunal had mentioned. There is no denying that the decision in the letter of 24 November 1993 did refer to her shortcomings in the Director-General's secretariat, as reflected in an appraisal report of 28 June 1991. But that reference must not be taken out of its proper context, which was to substantiate the impugned decision. In the third paragraph of the letter the Director of Administration said:

> "Since you have not worked at CERN since 26 April 1991 we have been unable to reassess your performance. It seems from Professor Raix's conclusions, which were notified to you on 1 November 1993, that you are not well enough to consider any early return to work on a new assignment to finish probation."

Such reasoning is quite plain. It makes a connection between the fact that CERN could not reassess her work and the fact that she was unfit to go back and finish the probation she had hardly begun. So it was not the appraisal made in 1991 that prompted the non-renewal but, as CERN says, the lack of up-to-date assessment of her performance and the fact that there was no real prospect of her being fit to go back. Those were lawful reasons for the decision of 24 November 1993 and they are not inconsistent with Judgment 1212.

12. Besides not offending against res judicata, the decisions the complainant challenges show no breach of precedent or of any general principle of the international civil service that would amount to a mistake of law. Her argument is that an international official who is unfit for work may be dismissed only for reasons of health. But that is beside the point because hers is not a case of dismissal. What happened was that, as was recounted above, CERN refused to renew her appointment and the effect of that decision was to let her have a "100 per cent pension for unsuitability" as from 4 June 1994 and the continuance of social insurance coverage even though she was not entitled to the higher pension for incapacity.

13. For the reasons given in 11 the complainant is wrong to say that non-renewal was due solely to the appraisal made in 1991. So the Tribunal rejects both her plea that the reason CERN gave for its decision was unlawful and her contention - which is not proven anyway - that the appraisal of her showed flaws.

14. Her allegations about breach of due process fail too. She argues that the decision of 24 November 1993, the "only real final decision she may challenge", is unlawful because it was taken before the Disability Board had reported, and that was in breach of Regulation R II 4.16. But that Regulation applies only to the procedure for deciding whether to "retain" someone, not to a case of non-renewal. CERN followed the procedure concurrently, and that accounts for the decision of 15 March 1994, but it does not have to be applied until the competent authority decides whether or not to renew the fixed-term appointment.

15. By the same token the complainant is mistaken in contending that the rules on non-renewal, including the requirement in Regulation R II 6.02 of six months' notice, apply to the procedure for deciding whether to "retain" someone. There being no need to take up the issue of receivability on this point, her procedural challenge to the quashing of the decision of 15 March 1994 must therefore fail. CERN was under a duty to complete the procedure which it had itself begun, and which might have led it to keep her on, if it so wished, after consulting the Disability Board. There was nothing improper about its decision of 15 March 1994. Though she was doubtless hard pressed, and the case was an awkward one for the Organization, the action it took may be deemed to have brought the dispute to an end as fairly as possible.

16. The conclusion is that her claim to the quashing of the impugned decision must fail, and so in consequence must her claims to damages.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re QURESHI Judgment 1426

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Nazir Qureshi against the Food and Agriculture Organization of the United Nations (FAO) on 14 June 1994 and corrected on 31 August, the FAO's reply of 26 October, the complainant's rejoinder of 23 November and the Organization's surrejoinder of 22 December 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Pakistani citizen who was born in 1944, joined the staff of the FAO at headquarters in Rome in 1978 as a guard at grade G.1. He was promoted to grade G.2 in 1979.

He says that on 9 October 1990, while replacing an attendant in the car park, he had a quarrel with another official whose driving he thought unsafe. The FAO says that the incident took place on 8 October. He suffered injury to two fingers. The FAO maintains that he got treatment for the injury from its medical service, finished his shift and went back to work the following day. The complainant denies having been treated by the medical service.

It is common ground that on 10 October he telephoned the office to say that he was ill; the chief medical officer examined him at home; the diagnosis was cerebral ictus, or a stroke; and he was taken to hospital.

In a letter of 7 September 1991 to the alternate secretary of the Advisory Committee on Compensation Claims he attributed his illness and resulting incapacity for work to the incident in the car park and asked that they be recognised as service-incurred. By a letter of 19 November 1991 the alternate secretary told him that the Administration had rejected his claim in keeping with the medical service's finding that the "minor incident" of 8 October 1990 had not caused his stroke.

On 17 December 1991 he sought "reconsideration" of his claim under FAO Manual paragraph 342.7.

The FAO thereupon convened a medical board, which submitted a report dated 13 February 1992.

He was separated from service on 21 April 1992 with a disability pension.

The secretary of the Advisory Committee informed him by a letter of 30 December 1993 that the Director-General had rejected his claim "on medical grounds". The secretary referred him to the material provisions on internal appeals in case he wanted to pursue the matter.

On 19 March 1994 he wrote asking the Director-General to review the decision.

By a letter of 18 May 1994, which he impugns, the Assistant Director-General in charge of Administration and Finance confirmed on the Director-General's behalf the rejection of his claim and explained that he might put his case to the Appeals Committee under Staff Rule 303.131 and Manual section 331.

B. The complainant sets out the events that led to what he describes as a "service-incurred natural accident". He claims an award of 500 million lire in "physical" damages for total incapacity for work.

C. In its reply the FAO gives its own account of the facts. It submits that the complaint is irreceivable because of the complainant's failure to exhaust the available internal means of redress. The decision of 18 May 1994, which he is challenging, refers to the next step in the appeal procedure. Since the decision is not a final one, direct appeal does not lie against it to the Tribunal.

D. In his rejoinder the complainant disputes the FAO's account and alleges that it altered evidence and mounted a "covert and gruesome" plot to "assassinate" him.

E. In its surrejoinder the FAO says it has no comments to add to its earlier submissions.

CONSIDERATIONS:

1. The complainant joined the headquarters staff of the FAO in May 1978 as a guard at grade G.1. He suffered a stroke on 10 October 1990. He claimed that his illness and subsequent total incapacity for work be recognised as service-incurred on the ground that his condition had been caused by an altercation he had had with a staff member in the car park of the headquarters building. The Organization rejected his claim in a letter dated 19 November 1991 from the alternate secretary of the Advisory Committee on Compensation Claims, to which his case had been referred. The letter conveyed to him the Committee's conclusion that there was no causal connection between the stroke and the incident in the car park.

2. In a letter of 17 December 1991 to the alternate secretary of the Advisory Committee he asked for reconsideration of his claim to recognition of his condition as service-incurred in accordance with FAO Manual paragraph 342.7. A medical board was convened and submitted a report. The Advisory Committee recommended rejecting his claim on medical grounds and the Director-General endorsed the recommendation. By a letter of 30 December 1993 the secretary of the Advisory Committee informed the complainant that the Committee had reviewed his case; that the Director-General had decided to reject it on medical grounds; and that if he did not agree he should submit an appeal to the Director-General within 90 days in accordance with Manual paragraph 331.3.

3. In the meantime, on the recommendation of the FAO Staff Pension Committee, he was granted a disability pension and he was separated from the Organization for reasons of health on 21 April 1992. He lodged an appeal with the Director-General in a letter of 19 March 1994. By a letter of 18 May 1994 the Assistant Director-General in charge of Administration and Finance rejected his appeal, stating that the rejection constituted a reply by the Director-General under Manual paragraph 331.311 and adding:

> "Should you wish to appeal against this decision to the Appeals Committee, you may do so in accordance with the provisions of Staff Rule 303.131 and Manual Section 331 within sixty days from the date of receipt of this letter."

The complainant chose instead to appeal directly to the Tribunal.

4. The Organization contends that the complaint is irreceivable because the complainant did not exhaust the

internal means of redress available to him under its regulations and rules.

5. The plea is upheld. Article VII(1) of the Tribunal's Statute provides:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

The complainant failed to go to the FAO Appeals Committee and so to complete the internal appeal process. Since the decision he is challenging is therefore not a final one within the meaning of Article VII(1), his complaint is not receivable and must be dismissed, there being no need to go into the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

SEVENTY-NINTH SESSION

In re SHARMA (No. 5)
(Application for execution)

Judgment 1427

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Hari Chand Sharma on 16 May 1994 for the execution of Judgment 1313, the reply of 2 September from the World Health Organization (WHO), the complainant's rejoinder of 16 October and the Organization's surrejoinder of 5 December 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. The WHO employed the complainant as a storekeeper at grade ND.4 on post 5.C008 in its Regional Office for South East Asia (SEARO). It terminated his appointment at 21 July 1987.

2. By Judgment 1238, which it delivered on 10 February 1993, the Tribunal ordered the Organization to do its utmost to reinstate the complainant as from that date in the post which he had held on 21 July 1987 or in any comparable post acceptable to him and only if that proved impossible to pay him additional damages equivalent to two years' salary and allowances.

3. In a letter of 20 May 1993 the Director-General said that he was not in a position to reinstate the complainant, who would therefore be paid the additional damages. By Judgment 1313, delivered on 31 January 1994, the Tribunal set aside that decision insofar as it refused to reinstate the complainant as from 10 February 1993, sent the case back for a new decision as to reinstatement and awarded him further damages equivalent to one year's salary for the failure to execute Judgment 1238.

4. By a letter dated 28 February 1994 the Director-General informed the complainant that he had instructed SEARO to send him all vacancy notices for positions in the General Service category of staff "to enable [him] to apply" for those he considered himself qualified for. The complainant replied on 17 March 1994 that the Tribunal's judgment did not require him to apply for a post and that the Organization had simply to reinstate him in an appropriate one. Observing that the very post which he had held had recently fallen vacant, he asked that he be reinstated in it. He sent a copy of his letter to the Regional Director for South East Asia. The Regional Director wrote to him on 23 March 1994 repeating that he would be sent vacancy notices to enable him to apply for posts he considered himself qualified for, but saying nothing about his reinstatement as storekeeper.

5. The complainant sent the Director-General one reminder on 13 April and a second on 10 May 1994. The Organization says that his letters of 17 March and 13 April were not received at headquarters and that it sent a reply on 25 May only to his second reminder reiterating what the Director-General had said at the outset.

6. On 16 May 1994 the complainant lodged this complaint pleading that the Organization had failed to comply with Judgment 1313 by requiring him to apply for a post, as if it were a matter of recruitment, and by not responding to his requests for reinstatement in his post as storekeeper. He asks for reinstatement in that post and for damages and costs.

7. On 5 July 1994 he received from SEARO notice of a vacancy for a storekeeper. He immediately repeated his request for reinstatement in that post. On 8 August he was allegedly "considered" for it by the Director of Support Programme at SEARO. After discussion about that post and others he was reinstated as a clerical assistant at grade ND.4 on post 5.C082 with effect - according to a personnel action form dated 6 October 1994 - from 11 February 1993. He took up duty on 16 August 1994.

8. In its reply to the complaint the Organization states that the complainant has been reinstated and his entitlements are being recalculated and it expresses the hope that he will withdraw suit. In his rejoinder he asks the Tribunal to rule on his claims other than to reinstatement and to arrears of pay. The Organization's surrejoinder makes it clear that he has since received the sums awarded in Judgments 1238 and 1313 as well as arrears of pay.

9. Yet the Organization did not execute Judgment 1313 as promptly as it should have. Instead it caused the complainant needless uncertainty by requiring him to apply for vacancies and by ignoring his request for reinstatement in the vacant post of storekeeper. It thus virtually compelled him to come back to the Tribunal, on 16 May 1994, and only on 16 August 1994, over six months after the date of Judgment 1313, did he return to duty.

10. The complainant has suffered no financial loss because he has been paid for the entire period since 10 February 1993. But he is entitled to moral damages for the injury due to the thwarting of his legitimate expectation of prompt and correct execution of the Tribunal's judgment. The Tribunal accordingly awards him 500 United States dollars under that head. It also awards him 200 dollars in costs.

DECISION:

For the above reasons,

1. The World Health Organization shall pay the complainant the sum of 500 United States dollars in moral damages.

2. It shall pay him 200 dollars in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

P. Pescatore

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re MACCHINO FARIAS (No. 2)   Judgment 1428

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Agustín Macchino Farías against the European Southern Observatory (ESO) on 5 August 1994, the ESO's reply of 24 October, the complainant's rejoinder of 25 November 1994 and the Observatory's surrejoinder of 2 January 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Under Article LS III 1.04 of the Regulations for Local Staff of the European Southern Observatory in Chile the rate of compensation for each hour of overtime done by someone in grade A or B is one-and-a-half times the basic rate. Up to 31 December 1989 Annex 16 to the Regulations said that "All Local Staff Members are entitled to receive 5 basic salaries per year as a special gratification". According to the amended version of that provision which came into force on 1 January 1990 staff members appointed from then on shall get four such "gratifications", or aguinaldos; others have an "acquired right" to five.

The complainant, a Chilean, joined the local staff of the ESO in 1972 as an electronics technician. He holds grade B3 and has been assigned since 1975 to the astronomic observatory at La Silla, in the Andes.

By a letter of 15 March 1994 to the staff the Director of the ESO in Chile announced that "the payment of overtime will be calculated taking into account the basic salary plus the proportion of 4 aguinaldos".

In a memorandum dated 12 May 1994 to the Director General the complainant objected to the reckoning of his overtime pay for April by reference to a "basic hourly rate" that left out one of the five aguinaldos that his salary comprised.

By a memorandum of 22 June 1994 the head of Personnel rejected on the Director General's behalf his "appeal" of 12 May on the grounds that acquired rights were intended to safeguard only "important matters" whereas the effect of reckoning his overtime payments on the basis of four aguinaldos instead of five was "minor". The "important" principle of equal treatment, he said, prevailed over such a "minor" difference in pay. That is the decision the complainant impugns.

B. The complainant submits that the ESO's reckoning of his overtime payments as from April 1994 is unlawful. As the Tribunal held in Judgment 1311 (in re Guerra Ardiles), all five aguinaldos, which are an item of regular pay, must be included in the reckoning of "basic salary".

He alleges breach of his acquired right to payment of the five aguinaldos. The loss to him was not "minor": it came to 6.25 per cent of his overtime pay. If the difference really was minor and the Observatory did care about equal treatment it had only to take account of five aguinaldos for all local officials.

He asks the Tribunal to quash the impugned decision and to order the ESO to include five aguinaldos in the reckoning of his overtime payments as from 15 March 1994. He seeks costs "as stated in the Local Staff Regulations".

C. In its reply the Observatory denies breach of his acquired rights. According to the case law an acquired right is one in which any change impairs the balance of contractual obligations or the essential terms that induced consent to the offer of appointment. But not until March 1994 did the ESO take account of any aguinaldos at all in reckoning the basic hourly rate. From the time of his recruitment until then the applicable rate was based on only twelve monthly "basic salaries". So the complainant might not expect the survival of a benefit he had never had.

D. In his rejoinder the complainant observes that the ESO is bound by its own rules. Since the Administration itself declared that staff appointed before 1990, like the complainant, had an "acquired right" to the fifth aguinaldo it was not free to disregard a regular item of pay when reckoning basic salary.

E. In its surrejoinder the ESO says that it acknowledged the complainant's acquired right to payment of the fifth aguinaldo so as to ensure that even on transfer to another duty station he would still get some of the "mountain compensation" it paid staff at La Silla. But the Observatory did not deprive him of any benefit he had had before it started reckoning four aguinaldos in overtime payments.

CONSIDERATIONS:

1. The ESO employs the complainant as an electronics technician at La Silla in the Chilean Andes. It has a system of supplementing basic salary by paying additional aguinaldos*. Up to 31 December 1989 Annex 16 to the Regulations for ESO Local Staff in Chile read as follows:

> "All Local Staff Members are entitled to receive 5 basic salaries per year as a special gratification.
>
> These gratifications shall be paid in February, July, September and December of every year.
>
> In addition, Local Staff Members working on La Silla shall receive one basic salary as a mountain compensation in December each year."

2. As a consequence of Judgment 1311 (in re Guerra Ardiles) the Observatory amended Annex 16 as from 1 January 1990 to provide for the payment of four "basic monthly salaries" instead of five and of another two as "mountain compensation" instead of one. But it recognised that local staff who had been receiving five aguinaldos up to the date of the amendment had an acquired right to a fifth.

3. Before Judgment 1311 the ESO treated all aguinaldos as essentially different from salary. It did not count them towards the amount of basic salary that was relevant for the

---

* The term is translated as "gratifications" in the English version of its rules.

purpose of reckoning the service indemnity due under Annex 3 to the Regulations. In that judgment the Tribunal held, under 10, that "5 basic salaries" must be added to the yearly total paid according to the salary scales for the purpose of determining the basic salary relevant in reckoning the indemnity. But the Tribunal further held, under 11, that the "mountain compensation" was a special allowance within the meaning of Article 1.01 of Annex 3 and "therefore irrelevant in reckoning the indemnity".

4. The ESO decided on 15 March 1994 to count the four _aguinaldos_, together with basic salary, so as to establish rates of pay for overtime in accordance with Article LS III 1.04, which prescribes entitlement to one-and-a-half times the basic rate. The mountain compensation was not included in the calculation. The complainant appealed against that decision and the Director General's final decision, taken on 22 June 1994, was to reject his appeal.

5. The complainant argues that, since Judgment 1311 ruled that the five _aguinaldos_ must be added for the purpose of determining the basic salary relevant in reckoning the service indemnity, the same principles should apply in reckoning the payment of overtime too. He claims an acquired right to the payment of five _aguinaldos_ and says that the ESO may not unilaterally reduce the number to four.

6. The ESO recognises the acquired right to payment of a fifth _aguinaldo_ but interprets it to mean that a local staff member stationed at La Silla should retain entitlement to such payment if transferred from La Silla but should not have it count towards overtime pay. It argues that there would be inequality of treatment if the fifth _aguinaldo_ had to be taken into account for that purpose. It contends that because it did not until March 1994 take account of any _aguinaldos_ in reckoning the basic rate the complainant could not have expected the survival of a benefit he had never had and that there was therefore no breach of his acquired right.

7. The plea fails. The acquired right to a fifth _aguinaldo_ comprises all the entitlements which any _aguinaldo_ conferred. One of those entitlements was the right to have it included as part of basic salary: see Judgment 1311. In determining the amount of basic salary, as against the special allowances, what counts is sums actually paid in salary, whatever they may be called and whatever method of accounting may be applied. Because the fifth _aguinaldo_ formed part of basic salary until it was eliminated, it follows that the fifth _aguinaldo_ must count in reckoning the basic rate of payment of overtime for anyone who has the acquired right.

---

8. The inequality which the Organisation fears will result from that ruling is inevitable when some staff members have an acquired right and others do not.

DECISION:

For the above reasons,

1. The Director General's decision of 22 June 1994 is quashed.

2. The ESO shall count five _aguinaldos_ in reckoning the payments due to the complainant for overtime.

3. The case is sent back to the ESO for recalculation of the payments due to him for overtime as from 15 March 1994.

4. The ESO shall pay him 1,000 United States dollars in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re EL MAHJOUB (No. 4) Judgment 1429

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Mohamed El Mahjoub against the International Labour Organization (ILO) on 20 June 1994, the ILO's reply of 31 August, the complainant's rejoinder of 9 September and the Organization's surrejoinder of 18 October 1994;

Considering Articles II, paragraph 1, and VII, paragraphs 1 and 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Libyan, was on the staff of the ILO from 1 January 1985 until 31 December 1991. Information on his career in the Organization appears under A in Judgment 1213, which was about his first complaint.

On 13 February 1992 he filed a claim under Annex II of the Staff Regulations of the International Labour Office, which is headed "Compensation in event of illness, injury or death attributable to the performance of official duties". The claim arose out of injury to his knee which, he alleged, was attributable to two accidents, one on 23 July and the other on 23 October 1991.

By a letter of 28 May 1993 the secretary of the ILO's Compensation Committee informed him that the Director-General had endorsed the Committee's recommendation that the two accidents should not be recognised as "attributable to the performance of your official duties". The secretary explained that in the Committee's opinion several causes of his knee injury were possible and there was no evidence to suggest that either accident had had any significant effect on it.

The complainant disputed the rejection of his claim and after correspondence with the secretary filed on 28 February 1994 a "complaint" under Article 13.2 of the Staff Regulations. In a letter dated 28 March 1994 the Chief of the Personnel Administration Branch asked him to identify the decision he was objecting to and, if appropriate, to explain, along with any further comments he wished to add, why he considered his "complaint" receivable despite his failure to observe the six-month time limit in 13.2.

The Administration having lost the text of his reply of 17 April 1994, the Chief of the Personnel Administration Branch expressed regret in a letter of 10 June and asked him for another copy.

By a letter of 3 July, to which he appended a copy of his communication of 17 April, the complainant told the Chief of the Branch that he had already put his case to the Tribunal under Article VII(3) of its Statute.

B. The complainant submits that he is entitled to compensation for service-incurred injury. He says that he submitted his claim in time and that, not having referred the matter to a medical board, the Director-General plainly does not dispute the relevant medical issues. Besides, the Staff Regulations "do not describe anything about the Compensation Committee and its functions".

He asks the Tribunal to "quash the unlawful action" which he says "froze" his "compensation payments" under Annex II of the Staff Regulations.

C. In its reply the ILO contends that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because of the complainant's failure to exhaust the internal means of redress. It was he who preferred making a 13.2 "complaint" to the setting up of a medical board, which the secretary of the Compensation Committee suggested in a letter to him of 18 August 1993. Article 13.2 requires that any complaint of treatment inconsistent with the Staff Regulations be filed "within six months", and his 13.2 "complaint" of 28 February 1994 came well after time had run out for appeal against the ILO's refusal to pay compensation.

As for the rejection he infers under Article VII(3) of the Statute, the reason why he did not get immediate notice of rejection - apart from the clerical error that compounded the delay - was the Administration's wish to respect due process by letting him state first his views on receivability.

On the merits the ILO observes that he failed to inform its Medical Service of the two accidents, only the second of which had been witnessed; that he did not consult a doctor after the first accident and did so only nine days after the second; and that there was no evidence to show that either of the accidents had any effect on his condition. Although the Director-General had told him the reasons for the rejection of his claim, he failed to assert his right - which the Administration reminded him of in its letter of 18 August 1993 - to have a medical board review his case.

D. The complainant rejoins that his complaint is receivable and presses his pleas on the merits. The Administration has never indicated the exact reference of the circular by which it set up the Compensation Committee. The recommendation of the committee is "illegal".

E. In its surrejoinder the Organization maintains its stand on receivability and, subsidiarily, on the merits. It produces "General Instruction No. 290" of 1 July 1965 by which the Director-General set up the Compensation Committee to advise him on claims arising under Annex II of the Staff Regulations.

CONSIDERATIONS:

1. The complainant's appointment at the ILO ended on 31 December 1991. He is claiming compensation for a knee injury which he attributes to two accidents that occurred during working hours on the Organization's premises, one on 23 July and the other on 23 October 1991.

2. The complainant failed to report the accident of 23 July to the ILO's medical service. A private practitioner examined him on 23 October after the other accident. Although he consulted the medical service on 13 September and on 4, 25 and 26 November 1991, not until 29 November did he consult it about the injury to his knee, which he blamed on the accident of 23 July.

3. On 13 February 1992 he filed a claim under Annex II to the Staff Regulations, which contains the rules on compensation. The Administration referred his claim to its Compensation Committee. The secretary of the Committee informed him by a letter of 28 May 1993 that the Director-General had decided on the Committee's recommendation that the accidents were not to be regarded as service-incurred or as having had any "significant effect" on his condition.

4. By a letter of 18 August 1993 the secretary informed him of his right to have a medical board appointed under the provisions of paragraph 25(b) of Annex II to the Staff

Regulations. But he declined on the grounds that the Director-General had not chosen to refer the matter to a medical board and he himself was therefore entitled to presume that there was no conflict of opinion on the medical aspects of the connection between the injury and the performance of his official duties. Further, he took the view that as the Compensation Committee was not provided for in the Staff Regulations the establishment of it was at variance with those Regulations.

5. The Organization pleads that the complaint is irreceivable because the complainant failed to exhaust within the prescribed time limits the internal means of redress that were available to him. It cites Article 13.2 of the Staff Regulations, which provides:

> "Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall ... be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six months of the treatment complained of. ..."

6. That plea is sustained. As the Tribunal has often declared - for example in Judgment 1244 (in re Popineau No. 5) under 1 - Article VII(1) of its Statute means that a complainant must have not only gone through any internal appeal procedure within the organisation but duly complied with the rules on that procedure. The Director-General's decision to refuse compensation was notified to the complainant in the letter of 28 May 1993 from the secretary of the Compensation Committee. He did not lodge his internal appeal until 28 February 1994, i.e. after the time limit of six months in Article 13.2. His complaint is for that reason irreceivable under Article VII(1) of the Tribunal's Statute.

7. There is therefore no need to rule upon the ILO's further objection that he failed to exhaust the internal means of redress because he did not ask to have a medical board set up.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

E. Razafindralambo

Mark Fernando

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re WOOLLARD

Judgment 1430

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Robert John Woollard against the International Atomic Energy Agency (IAEA) on 26 August 1994 and corrected on 5 September, the IAEA's reply of 21 November, the complainant's rejoinder of 29 December 1994 and the Agency's surrejoinder of 13 March 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Paragraph 68 of Section 3 of Part II of the IAEA's Administrative Manual reads:

> "Appointments to posts subject to geographical distribution require sponsorship by the competent authorities in the applicant's Member State. This will be obtained by the DIR-ADPR [Director of Personnel] before an offer of appointment is made to the selected candidate. Such sponsorship is deemed to have been given if the Member State concerned does not inform the DIR-ADPR to the contrary within a reasonable period of time after having been approached in writing by the Agency."

On 31 January 1990 the Director General issued circular SEC/NOT/1309 entitled "General policy for advancement from the general service to the professional category". Paragraph A2 of the circular reads:

> "In the case of posts subject to geographical distribution, due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible. Accordingly, government sponsorship will be required."

The complainant, a British citizen who was born in 1941, joined the Agency at its headquarters in Vienna on 21 February 1978 as a clerk at grade G.5 in the Division of Safeguards. After a series of short-term appointments he was given a fixed-term contract as from 1 January 1979. His appointment has since been regularly renewed. At the material time his grade was G.6.

On 22 December 1993 he applied for a grade P.3 post as a head of unit in the Division of Budget and Finance, advertised in vacancy notice 93/068 of 29 September 1993. The notice said: "Appointment is subject to government endorsement".

By a memorandum of 25 January 1994 the complainant asked the Director of Personnel to waive the requirement of government sponsorship in paragraph A2 of circular SEC/NOT/1309. In his view the requirement was incompatible with his status as an international civil servant as defined in Article VII.F of the Agency's Statute and in Provisional Staff Regulation 1.01. The acting Director of Personnel replied in a memorandum of 15 February that the complainant's request was premature since government sponsorship was not required until the process of selection had been completed.

By a memorandum of 17 February the head of the Recruitment Unit of the Division of Personnel informed the complainant that his application had been unsuccessful.

In a letter of 17 March to the Director General the complainant applied under Staff Rule 12.01.1(D)(1) for review of the acting Director of Personnel's decision of 15 February. He also sought leave to go directly to the Tribunal. In a letter of 31 May to the complainant the Director General gave him such leave, declined to go back on the decision of 15 February and said that the procedure for consultation with governments set out in paragraph 68 of Part II/3 of the Administrative Manual was being reviewed. That is the decision he is challenging.

B. The complainant argues that government sponsorship of applicants is inconsistent with the law of the international civil service. The Agency has made such sponsorship the main prerequisite for the appointment of staff. That offends in particular against Article VII.D of its Statute, which reads:

> "The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the

> highest standards of efficiency, technical competence, and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible."

Without government sponsorship a candidate cannot qualify for appointment, however suitable he may be. To require sponsorship means leaving the choice of staff to member States. Though the Director General might reject candidates sponsored by some governments, that would make it difficult for him to comply with the requirements of geographical distribution.

The complainant cites Article VII.F of the Agency's Statute, which says that "the Director General and the staff shall not seek or receive instructions from any source external to the Agency". In his submission the Director General infringes that rule by undertaking to disregard any candidate not sponsored by a government. The Tribunal has pointed out more than once that there is no valid reason why the executive head of an organisation should fall in with the wishes of governments. Besides, can a staff member who owes appointment to government sponsorship ever be truly independent.

The complainant's request for waiver of the requirement was not premature. Paragraph A2 of circular SEC/NOT/1309 affects in two ways the lawfulness of the process of selection. First, a government that sponsors an applicant may expect a favour in return once he is appointed, and that may deter potential candidates. Secondly, the selection body is likely to prefer an outside candidate who already has sponsorship to an inside one who has yet to secure it.

The complainant asks the Tribunal to declare void paragraph 68 of Part II/3 of the Administrative Manual and paragraph A2 of circular SEC/NOT/1309, quash the Director General's decision of 31 May 1994, and order the Agency to reconsider the decision that the head of the Recruitment Unit took on 17 February 1994 to reject his application or, failing that, pay him suitable "monetary compensation" and grant "any other appropriate relief". He claims 25,000 schillings in costs.

C. In its reply the Agency submits that the complainant's challenge to paragraph 68 of Part II/3 of the Administrative Manual is irreceivable. Since his application was turned down on the grounds of inadequate professional experience he has no cause of action. It would be illogical to ask a government to sponsor someone who has not yet been chosen. The procedure for consulting governments is being reviewed.

The Agency contends that the complainant's claim to the quashing of the Director General's decision of 31 May 1994 is devoid of merit. His allegations on that score are purely speculative and have no substance in fact.

The requirement of government sponsorship is useful in checking a candidate's credentials, and that is especially important because of the sort of work the Agency does. Paragraph 68 of Part II/3 squares with Article VII.D of its Statute. A requirement is not necessarily unlawful just because it makes recruitment harder. Besides, the main criterion in recruiting staff is still the need to attain "the highest standards of efficiency, technical competence, and integrity" since selection takes place before government sponsorship is sought.

The Agency contends that in this case the independence of the international civil service is not at issue and there is no question of any breach of Article VII.F of its Statute. The Director General has when necessary been waiving the requirement of government sponsorship. It was on procedural grounds and in accordance with paragraph 68 of Part II/3 that he declined to waive it in the present case.

D. In his rejoinder the complainant presses all his claims. He submits that the Agency has tried to mislead the Tribunal by stating that on 15 February 1994 the process of selection had not yet been completed: two days later it informed him that his application had been rejected.

He points out that under paragraph 50 of Part II/3 outside applications for posts which are subject to geographical distribution are as a rule submitted to the Agency through government channels, and a government is hardly likely to refuse sponsorship of someone it has itself put forward. In any event, when government sponsorship comes in is a question that has no bearing on the lawfulness of the rule under challenge. Likewise, the rule is not lawful just because the Director General has been waiving the requirement of government sponsorship in the exercise of implied discretionary authority.

E. In its surrejoinder the Agency enlarges on its arguments. It maintains that the rule has caused the complainant no injury. Indeed he does not deny that he was unqualified for the post he wanted.

It submits that he is confusing the procedure whereby outside applications are channelled through member States with the process of government sponsorship. Whereas the former comes under paragraph 50 of Part II/3 and is mere routine, the latter requires the government to assess the candidate. What is more, the Agency receives many outside applications directly.

CONSIDERATIONS:

1. The complainant joined the staff of the Agency on 21 February 1978 under a short-term contract as a data preparation clerk in the Division of Safeguards. His grade was G.5. He was granted a fixed-term appointment as from 1 January 1979 in the same position and at the same grade and had it constantly renewed. His present appointment is also in a grade of the General Services category, G.6.

2. On 29 September 1993 the Agency issued a vacancy notice, No. 93/068, for a grade P.3 post. The post was for a head of unit in the Division of Budget and Finance. The complainant applied on 22 December 1993.

3. The "essential qualifications" for the post were:

> "University degree in Business Administration, Accounting or Economics. At least six years of work experience and responsibility in financial management and supervisory experience. Good knowledge and experience in data processing and [personal computer] applications."

The notice further stipulated: "Appointment is subject to government endorsement". It required applicants to submit a "detailed Curriculum Vitae".

4. The complainant's application merely stated that he possessed the "qualifications necessary" and "much experience" and that before 1978 he had been "employed as an Accountant by IBM and by the Royal Chartered Institute of Secretaries in London", though he did not say that such experience had lasted "at least six years".

5. The Agency's policy on government sponsorship for appointment to a post in the Professional category of staff is set out in paragraph 68 of Part II/3 of its Administrative Manual. That paragraph is reproduced in A above. It applies also to advancement from the General Services to the Professional category.

6. By a memorandum of 25 January 1994 to the Director of Personnel the complainant asked that the requirement of government sponsorship be waived on the grounds that it was incompatible with his status as an international civil servant and with Article VII.F of the Agency's Statute, which provides:

> "In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency. They shall refrain from any action which might reflect on their position as officials of the Agency; subject to their responsibilities to the Agency, they shall not disclose any industrial secret or other confidential information coming to their knowledge by reason of their official duties for the Agency. Each member undertakes to respect the international character of the responsibilities of the Director General and the staff and shall not seek to influence them in the discharge of their duties."

7. The acting Director of Personnel replied in a memorandum of 15 February that government sponsorship was "not required before the selection process for a post has been completed", that it was "premature to address the matter at this point in time", and that he would "revert to the question ... only when this becomes of relevance" to the complainant.

8. By a letter of 17 February the head of the Recruitment Unit of the Division of Personnel informed him that his application had not been successful. "This", the letter added, "does not, in any way, reflect upon your qualifications or personality but is solely the result of the competitive selection process in which, usually, a large number of candidates from all over the world compete".

9. By a letter of 17 March the complainant asked the Director General to review in accordance with Staff Rule 12.01.1(D)(1) the decision communicated to him on 15 February by the acting Director of Personnel and either to grant him the waiver he had originally asked for or determine that the requirement of government sponsorship was not a rule "that can be maintained by the Agency", or, failing that, give him leave to appeal directly to the Tribunal without going through the internal appeal procedure.

10. In his reply of 31 May the Director General said that it would have been premature on 15 February 1994 to decide whether or not to waive the requirement of government sponsorship since no candidate had then been selected for appointment. The Director General agreed to the complainant's submitting the matter directly to the Tribunal without first exhausting the internal remedies. He added that "an evaluation of the consultation procedures with Governments as set forth in paragraph 68 of AM.II/3 is presently under way".

11. The complainant has accordingly come straight to the Tribunal and his main claims are that it:

(a) declare the requirement of government sponsorship in paragraph 68 of Part II/3 of the Administrative Manual and paragraph A2 of circular SEC/NOT/1309, which extends the requirement to General Services staff, to be void as contrary to Articles VII.D and VII.F of the Agency's Statute and to the general principles of international civil service;

(b) quash the Director General's decision of 31 May 1994, which upheld the refusal of the acting Director of Personnel to waive the requirement; and

(c) direct the Agency to reconsider his application of 22 December 1993 or, failing that, award him damages and any other appropriate relief.

12. The Agency contends:

(a) The experience which the complainant had acquired before joining its staff did not satisfy the requirement of at least six years' work experience and responsibility in financial management.

(b) The requirement of government sponsorship is in conflict neither with Articles VII.D and VII.F of its Statute nor with the general principles of the international civil service.

(c) Government sponsorship is sought only after a candidate has been selected on merit and with regard to the paramount consideration, laid down in Article VII.D, of ensuring the highest standards of efficiency, technical competence and integrity.

(d) Though the Director General has in the past been waiving the requirement of government sponsorship where necessary, the need to consider such waiver arises only after a candidate has been selected on merit and it was premature in this case to consider waiver before a selection had been made.

13. The complainant has not at any stage given details of the nature and extent of his work experience and responsibility in financial management or of his supervisory experience so as to show that he had one of the essential qualifications stipulated in the vacancy notice. He did not give such details even after the Agency had pleaded in its reply that he lacked the qualifications for the post. So he was not eligible anyway according to the terms of the vacancy notice for selection to the post and the decision not to select him has caused him no injury.

14. It is therefore unnecessary to consider whether the Agency was right to refuse to waive the requirement of government sponsorship of his application or whether the requirement should be declared void.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

E. Razafindralambo

Mark Fernando

A B Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re VOLLERING (No. 4) **Judgment 1431**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 29 March 1994, the EPO's reply of 24 June, the complainant's rejoinder of 29 September and the Organisation's letter of 26 December 1994 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The EPO employs the complainant, a Dutchman, as a patent examiner at grade A3 in Directorate-General 1 (DG1) at The Hague.

By a note of 2 March 1992 the Vice-President in charge of DG1 announced to the staff the "production target" for 1992, calling for the utmost effort to make up for a fall in output at The Hague office in 1991.

In a note of 28 April 1992 headed "Your output for 1991. Shortfall to be made good in 1992", the Deputy Principal Director of Search told the complainant that his output in 1991 should have been 55 search-files for 91.2 days' work and that since he had done only 45 files his target for 1992 was raised by 5. The complainant answered in a note of 6 May that he did not know what authority the Deputy Principal Director had to issue such instructions and he would take no notice. On 2 June the Deputy Principal Director answered that it was he who set production targets and saw that they were reached and that his decision came under the note of 2 March 1992 from the Vice-President in charge of DG1. In a note of 10 June the

Principal Director of Search informed him that the "tone and style" of his note of 6 May were "wholly unacceptable" and that there might well be disciplinary proceedings.

On 23 June 1992 the complainant lodged an internal appeal with the President of the European Patent Office, the Organisation's secretariat, seeking review of his production target for 1991. He alleged failure to deduct time during which he had been on strike, on 1 October and 11 December 1991, from the number of days spent on search work. On 24 June 1992 he filed a second internal appeal alleging that there was no basis in law for the Deputy Principal Director's order of 28 April that he do another five files in 1992.

In a note of 29 June he offered an apology to the Deputy Principal Director but said that the number of days he had spent on search came to 71.3, not the figure of 91.2 as given in the note of 28 April, the difference being accounted for not only by time on strike but also by the number of days he had spent on representation of the staff.

In his reply of 2 July the Deputy Principal Director said that in view of that new information the complainant had no "shortfall" to make good and the note of 28 April was "null and void". In a note of 7 July in answer to his of 23 June the Head of the Personnel Department told him on the President's behalf that the number of days he had spent on search work in 1991 had been corrected, by subtraction of one-and-a-half days on strike, to 89.7. There followed correspondence between the complainant and several officials in which he sought to have his "year-overview" corrected. In November 1992 he succeeded.

The Director of Personnel had informed him by a letter of 13 July 1992 of the referral of his appeal of 24 June 1992 to the Appeals Committee. In its report of 20 December 1993 the Committee took the view that in the absence of any act affecting him adversely his appeal was irreceivable. By a letter of 13 January 1994, which he impugns, the Director of Staff Policy informed him of the President's rejection of the appeal.

B. The complainant submits that it is at odds with the principle of equal treatment to give additional work to an examiner who fails to meet the production target for any particular year. The EPO does not demand less from someone whose output is greater than the set figure.

So raising his target for 1992 amounts to a hidden disciplinary sanction. That being so, the Administration ought to have consulted the Disciplinary Committee beforehand, and it infringed his right to a hearing.

Only the wrong figures in the note of 28 April 1992 led the Deputy Principal Director to back down, but he still assented to the legitimacy of the idea of a "shortfall", for which there is no basis in law.

The complainant challenges the opinion of the Appeals Committee, which he charges with bias. The note of 28 April, he explains, contained a false accusation which he was given no opportunity to answer. So it did cause him injury, and withdrawing it did not give him satisfaction. The chairman of the Committee treated him roughly, failed to examine his appeal properly and denied him due process.

The notion of a "shortfall", which holds good, affects all examiners. So he asks the Tribunal to "condemn" the Organisation and award him (a) 10,000 guilders in moral damages for the "false accusation"; (b) 5,000 guilders in damages for "reluctance" to correct his "year-overview"; (c) 10,000 guilders in damages for breach of his right to a hearing; (d) 10,000 guilders in damages for declaring the unlawful "shortfall"; (e) 10,000 guilders in damages for disciplinary action the EPO took without following the procedure prescribed in Articles 25 and 93 to 105 of the Service Regulations; (f) 5,000 guilders in damages for breach of due process on appeal; and (g) 10,000 guilders in costs.

C. In its reply the EPO submits that, besides being devoid of merit and vexatious, the complaint does not contain the same claims as did the internal appeal and is therefore irreceivable.

In subsidiary argument on the merits the Organisation contends that the Deputy Principal Director's note was due to a mere miscalculation and did not amount to disciplinary action. The Administration took the complainant's objections and granted him full satisfaction by withdrawing the content of the note and not increasing his target. There were no exceptional circumstances warranting moral damages.

Under Article 111 of the Service Regulations the Appeals Committee is a fully autonomous body, and the Administration is not liable for any views it may express.

The content of the note of 10 June 1992 from the Principal Director of Search was warranted inasmuch as the complainant went too far in his note of 6 May.

D. In his rejoinder the complainant says that the means of appeal open to international civil servants in general and to EPO staff in particular are not good enough, the advantage lying with the Administration. He sees nothing vexatious about his case and he presses his pleas. He seeks the award of another 5,000 guilders in damages for the moral injury attributable to the gratuitous allegation that his complaint is abusive.

CONSIDERATIONS:

1. On 4 May 1992 the complainant, who is a patent examiner with the European Patent Organisation, got a note dated 28 April 1992 from the Deputy Principal Director of Search. It said that the director of his unit might have expected 55 files from him for the 91.2 days of search work he had done in 1991 but that he had handed in only 45; since there was a "shortfall" of 10 he was asked "to do another 5 by the end of 1992". The complainant answered that the Deputy Principal Director had no authority to write such a note, that the figures used to reckon his output were wrong, and that there was no basis in the rules for ordering him to make good a "shortfall". He put two internal appeals to the President of the Office and in a note of 29 June 1992 to the Deputy Principal Director he gave what he thought were the right figures.

2. The Deputy Principal Director's answer of 2 July 1992 acknowledged that for the purpose of reckoning output the time he had spent on search work should be only 71.3 days instead of 91.2; so there was "actually no shortfall" and he was to "treat the note of 28 April 1992 as null and void". He went ahead with his case nevertheless and the President of the Office referred it to the Appeals Committee. On 20 December 1993 the Committee reported that the complainant's appeal was irreceivable on the grounds that the challenged note of 28 April 1992 had been unreservedly withdrawn and in any event he could plead no breach of any material rule. The President agreed and rejected his appeal by a decision of 13 January 1994.

3. That is the decision he is impugning and asking the Tribunal to quash. He also wants it to order the EPO to pay him various amounts in damages for the injury he attributes to the "false accusation" it wittingly based on wrong figures; to its reluctance to make the required corrections; to breach of due process; to its asking him to make good the "shortfall"; to the disciplinary action it took without having followed the proper procedure; and to flaws in the Appeals Committee proceedings. He also claims costs and in his rejoinder a further sum in damages.

4. The gist of his case is that the note of 2 July 1992 did not settle his dispute with the Organisation: though the

Administration put the original figures right it has never in so many words acknowledged its error in law in requiring him to make up a "shortfall", and that was tantamount to disciplinary action.

5. He is mistaken. The case turns on the lawfulness of the decision in the note of 28 April 1992. The official who wrote it has withdrawn it and declared it null and void. Whatever his reasons for doing so may have been, the only possible inference is the one drawn by the Appeals Committee, namely that the complainant has no cause of action and his complaint is therefore irreceivable. The Tribunal will not rule whether it is proper to order someone to make good a "shortfall" since in the event there was no such order and there is no longer any substantive dispute between the complainant and the Organisation.

6. It is true that the Appeals Committee took up only his appeal of 24 June 1992, not the one of 23 June objecting to the Deputy Principal Director's figures and asking for corrections. But, as he says himself in his rejoinder, both appeals had the same origin, the Deputy Principal Director's note, and the evidence is that the EPO made in November 1992 the corrections he wanted. On that score too he has obtained satisfaction and shows no cause of action.

7. Since his claim to the quashing of the decision fails so do his claims to damages. The EPO did not take unduly long to correct its mistakes and in the circumstances they caused him no injury. Nor does the evidence bear out his allegations of breach of due process by the Administration and the Appeals Committee. In his rejoinder he claims damages for the injury he says the Organisation has caused him by gratuitously describing his complaint as vexatious. That claim fails too. Though maintaining that the complaint "constitutes an abuse", the EPO does not ask the Tribunal to dismiss it as irreceivable for that reason. The defendant is merely exercising the freedom of speech that any litigant must be allowed, short of resorting to offensive or insulting language.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot Mella Carroll

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re ABOO-BAKER

Judgment 143

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Fawzia Aboo-Baker against the World Health Organization (WHO) on 25 July 1994, the WHO's reply of 12 October 1994, the complainant's rejoinder of 31 January 1995 and the Organization's surrejoinder of 7 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In 1985 the WHO appointed the complainant, a citizen of both France and Mauritius, as a consultant on a short-term appointment. In 1986 it granted her a two-year fixed-term appointment and assigned her to a grade P.5 post at Brazzaville, in the Congo, first as a medical officer, then as "technical adviser to the Regional Director" of its Regional Office for Africa (AFRO). In 1988 it promoted her to grade P.6.

In an attestation of 4 July 1988 the Regional Director certified that it would be inadvisable for her to stay on in Africa, where she had contracted an illness, and recommended her for a post at headquarters in Geneva. She was accordingly in Geneva from 1 January 1989 under a two-year appointment, though she was not formally transferred from AFRO.

By a letter of 31 May 1990 the Director of Personnel told her that she was to be transferred for one year as from 1 January 1991 to the Division of Mental Health at headquarters. On 4 February 1991 the head of Personnel Resources Administration informed her that her reassignment was confirmed and that the post she would hold was at grade P.5.

On 26 March 1991 - according to the complainant - or 26 May 1991 1991 - according to the WHO - she was informed of the Director-General's decision to let her keep her own grade, P.6.

By a letter of 27 September 1991 the Director of Personnel informed her that for budgetary reasons her appointment would be terminated on 31 December 1991. On 5 November 1991 she had an end-of-service medical examination. The Chief of Contract Administration wrote to her on 3 December 1991 to confirm termination.

In mid-December 1991 the complainant went on holiday to Mauritius. By a medical certificate of 24 December 1991 her own doctor recommended sick leave until 24 January 1992, by another of 21 January he recommended it until 24 February.

By a memorandum of 29 January 1992 a personnel officer of AFRO told her that the Regional Director had decided to reassign her as from 1 January to a grade P.5 post at Brazzaville, though she would still keep grade P.6. She accepted the offer by a letter of 19 February.

By a fax of 21 February the Director of Personnel informed the personnel officer that she could not be reassigned until a medical examination and other formalities had been completed.

At the end of February she left Mauritius for Geneva, where she saw the Regional Director. On 8 March 1992 she travelled to Windhoek, in Namibia, on tickets paid for by AFRO. By a memorandum of 13 March the personnel officer told her that for reasons of health she was to be offered a post at Windhoek. He enclosed a post description dated 5 March and signed by the Regional Director. By a fax of 23 March the complainant replied that she would prefer the post at Brazzaville but would consider the post in Namibia "only as an initial and very temporary assignment".

By a cable of 25 March 1992 the personnel officer informed the Director of Personnel of the complainant's reassignment to Namibia and asked him to approve putting her on leave without pay from 1 January to 7 March 1992 so that her case could be sorted out. The Director agreed in a cable of 27 March.

Having fallen ill again she went to Geneva on 10 April.

By cables of 2 and 3 July 1992 the personnel officer of AFRO asked the Director of Personnel to start the administrative formalities for reassigning her to Namibia. In a fax of 7 July the Director explained the reasons why he could not. By a memorandum of 7 August the Regional Director asked the Director-General to clear up the complainant's status. The Director-General replied in a memorandum of 28 August that the findings of an inquiry he had ordered had led him to endorse the Director of Personnel's decision.

By a letter of 20 October 1992 AFRO told the complainant that she held no contract of employment. She appealed against the decision on 26 October 1992 to the regional Board of Appeal and on 2 November 1993 to the headquarters Board. In a report of 4 March 1994 the headquarters Board recommended rejection of her appeal. By a letter of 27 April 1994 - the impugned decision - the Director-General informed her that her appeal had failed.

B. The complainant has two pleas.

Citing Judgment 938 (in re Hill No. 2), which says "a staff member cannot be separated while on sick leave", she submits first that her appointment did not expire on 31 December 1991 but was extended until 24 February 1992, the date at which her sick leave ended. So the Organization acted arbitrarily by putting her on leave without pay for the whole period from 1 January to 7 March 1992 and then refusing to treat her as an employee in the same period.

Her second plea is that there was a contract properly concluded between her and the Organization for the post in Namibia. Citing again the case law, she submits that a contract exists when all the essential terms have been agreed on, and any point still pending is just a formality not requiring further agreement. She reached "full oral agreement" with the Regional Director and the Organization gave her airline tickets for Namibia. She was given written confirmation of the offer and actually performed the duties of the post for one month.

In her view the headquarters Board was mistaken. The WHO acted in bad faith by refusing to acknowledge her new appointment on the grounds that she did not have medical clearance. She did have a check-up in November 1991, just before she left, and always kept the WHO informed about her health, as is plain from the personnel officer's memorandum of 13 March 1992 which actually mentions the subject.

She wants the WHO to recognise her entitlements to sick leave and, "subsidiarily", to leave without pay from 1 January to 24 February 1992; to grant her leave without pay from 25 February to 7 March 1992; to recognise that her appointment to the post in Namibia was valid as from 8 March 1992 up to 7 March 1994; to inform the United Nations Joint Staff Pension Fund that she remained affiliated until 7 March 1994; and to pay her the amounts due, plus interest at the rate of 10 per cent a year. She seeks moral damages and costs.

C. In its reply the Organization submits that the complainant's appointment ended in accordance with the rules on 31 December 1991. Judgment 938 is immaterial since WHO Staff Rule 740.5 says that entitlement to sick leave expires at the same time as appointment. Under Rule 470.1 the complainant would have been entitled to leave without pay only if she had been assigned to another post. But she was not.

The complainant had no contract of any kind with the Organization in 1992. She has produced no evidence of any "oral agreement", nor was any agreement reached on the essential terms of the contract: pay, grade, duties and duration were not defined, and the fact that she was given airline tickets does not amount to evidence of the existence of any contract. The offer of a post in Namibia was first mentioned in the memorandum of 13 March 1992 but her fax of 23 March was not proper acceptance of it. Besides, none of the prior conditions for conclusion of a contract had been met. For one thing, the medical clearance required by Rule 430.1 and 430.2 was lacking. Having held several appointments already, the complainant must have known that such clearance was important and the end-of-service medical examination, which has a quite specific purpose, was no substitute. Besides, the Namibian Government never approved her reassignment

In conclusion, the Organization observes that the Regional Director was not authorised to grant her an appointment, and she acted in bad faith by trying to force the Organization to treat her as a member of its staff.

D. In her rejoinder the complainant submits that Rule 740.5 provides simply that sick leave may not begin after expiry of appointment but means extending the appointment if it begins before expiry. There was a valid contract for reassigning her to Namibia. The Medical Service behaved inconsistently. Her fax of 23 March did amount to acceptance of the oral offer of a job she was doing anyway. She saw her own doctor before she left. It is wrong for an organisation that promises "health for all" to treat so lightly an illness she contracted in its service.

E. In its surrejoinder the WHO maintains that the documents she says she got before leaving for Namibia do not amount to any proper contract. The prior conditions for the issuance of a contract had not been met; she did not really accept the offer; and her own doctors' opinions do not replace clearance by its own Medical Service.

CONSIDERATIONS:

1. The complainant joined the staff of the World Health Organization in 1985. She held several fixed-term contracts. The last of them was to run out on 31 December 1991. By a letter of 27 September 1991 the Director of Personnel told her, while she was on duty at headquarters, that her appointment would end on 31 December 1991. She asked to be put on the list of staff available for any vacancies. She had an end-of-service medical examination on 5 November 1991, was granted leave in December to go on holiday, and went to her country of birth, Mauritius. Because she was to go back to Geneva for several days' work after the holiday she did not yet go through the end-of-service formalities. In a letter she sent on 23 December 1991 from Mauritius and which the Organization received on 22 January 1992 she applied for leave without pay. On 24 December 1991 she got a doctor's certificate recommending one month's sick leave. By a second certificate the doctor recommended extending sick leave until 24 February 1992.

2. On 29 January 1992 the complainant received an offer from the WHO's Regional Director for Africa of reassignment to a post at Brazzaville. She accepted subject to medical clearance in Europe. She returned to Geneva in late February and had medical tests. They showed that it would be unwise for her to go to any tropical clime, though it was not actually forbidden. At about the same time, and in circumstances on which the evidence does not shed light, she got an invitation, seemingly from the Regional Director, to take up a post at Windhoek, in Namibia. With airline tickets issued by order of the Regional Office she set off for Windhoek on 8 March 1992. There she got written confirmation of the offer. She accepted it on 23 March 1992 with the rider that she would rather have had the post at Brazzaville but was willing to treat Namibia "only as an initial and very temporary assignment". After a month in Namibia she fell ill. She was sent to Geneva on 10 April 1992 and never went back.

3. She soon learned that, despite the Regional Office's backing, Personnel were refusing to acknowledge her appointment in Namibia and took the view that she had no contract of service with the Organization. She appealed to the regional Board and then to the headquarters Board of Appeal. The headquarters Board recommended rejection. By a decision of 27 April 1994, which she is impugning, the Director-General authorised the recovery of any sums paid to her on account of her stint in Namibia from 9 March to 10 April 1992 but granted her the pay and travel allowance she would have been entitled to as short-term consultant at grade P.5 over the same period. He thereby refused to grant her any contractual rights whatever.

4. The complainant submits that she was to be treated as having been on leave up to 7 March 1992 and from 8 March held an appointment in Namibia which is binding on the WHO. The Organization retorts that her contract of service ended on 31 December 1991 and she had no entitlement to leave thereafter. But the nub of its case is that she had no contract appointing her to the post she held for a few weeks in Namibia.

5. On the first issue that the WHO raises, there is no doubt but that her assignment to the Division of Mental Health at headquarters ended on 31 December 1991: she was given due notice of non-renewal and had the end-of-service medical examination. A certificate dated 24 December from her doctor in Mauritius said: "She needs one month's sick leave", and another one, dated 21 January 1992, prescribed another thirty days' rest. But the effect was not to postpone the scheduled date of expiry of her contract. The fact is that she was not treated as having been on sick leave from 25 to 31 December 1991. So Judgment 938 (in re Hill No. 2), which she cites, does not support her case.

6. The second issue is whether despite the expiry of her contract she could be on leave from 1 January 1992. WHO Staff Rule 470.1 reads:

> "A staff member ... who is re-employed within one year of the termination of his appointment, may, at the option of the Organization, be reinstated. ... the intervening absence shall be charged to annual leave and leave without pay as necessary ..."

The complainant is asking, if she may not get sick leave - and she may not, since her contract had expired - that at least she be treated as having been on leave without pay in accordance with 470.1 from 1 January to 7 March 1992. The WHO submits that 470.1 does not apply because it did not re-employ her within one year of the date of expiry of her appointment. So the answer to her plea turns on the main issue, which is whether or not the WHO did re-employ her for the job in Namibia as from 8 March 1992.

7. The WHO observes that it signed no contract with her; that there was no agreement, not even oral, about the essential terms of any appointment; that she had not unconditionally accepted its initial offer of the post; and that medical clearance is a prerequisite of any contract.

8. The Tribunal is satisfied that even though there was no formal written agreement between the Organization and the complainant all the conditions that the case law requires were met for the existence of a legally binding contract.

9. First, a personnel officer gave the complainant notice by a memorandum of 29 January 1992 of the decision by the Regional Director for Africa to reassign her to a post at Brazzaville. She acknowledged receipt on 19 February 1992, gave express consent, and so had proper reason to expect reinstatement.

10. Secondly, on her return to Geneva, she was given airline tickets on the instructions of the Regional Office for Africa, and that was what induced her to go to Namibia. Several documents written before she left described the post she was to hold. Although, as the Organization submits, she fails to show that she was aware of them before leaving, she is highly unlikely to have been willing to set off without some inkling of what her duties were to be.

11. In any event the personnel officer sent her a memorandum of 13 March 1992 at Windhoek and it expressly refers to her appointment to post 3.3789 and sets out in full such matters as travel arrangements, grade, pay, subsistence allowance and other entitlements. A post description was appended. On 23 March 1992 she acknowledged receipt of the memorandum. Despite her reservations, which are set out in 2 above, she undoubtedly did accept the Organization's offer, especially since she was already in Namibia and carrying out the duties of the post on offer, and she was merely recording her desire for another assignment in future.

12. Lastly, there is ample evidence to show that the Organization did treat her as a staff member. It paid her an advance on salary. It brought her out of Windhoek. And the Personnel Division, which may have been misinformed, approved on 27 March her return to duty on 8 March 1992. Indeed not until the following July did headquarters state reservations about the appointment and then opposition. It is immaterial to the fact of recruitment that the decision to recruit her may have been taken ultra vires or may not have followed the necessary formalities. For one thing, the Organization must bear the consequences of any decision taken by someone it has itself appointed for the purpose, in this case the Regional Director for Africa. For another, the lack of prior medical clearance for the new post does not amount to a fatal flaw in the mutual agreement between the WHO's agents and the complainant. Besides, as was said in 1 above, she had undergone medical examination on 5 November 1991.

13. The conclusion from the foregoing is that the Organization is to be deemed to have re-employed her. She should accordingly have been granted leave without pay from 1 January to 7 March 1992 in accordance with Rule 470.1 and the terms of Personnel's decision in its cable of 27 March 1992. She is further entitled to pay from 8 March 1992 to 7 March

1994, plus interest at the rate of 10 per cent a year from the date at which each sum fell due. She is reinstated in her pension rights for the same period.

On account of the WHO's attitude towards her she has sustained moral injury over and above the injury for which redress is afforded in 13 above, even though the decline in her health does not warrant an award of damages under this head. So the Organization must pay her moral damages, and the amount is set ex aequo et bono at 10,000 Swiss francs. Lastly, she is awarded 7,500 Swiss francs in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 27 April 1994 is set aside.
2. The Organization shall pay her in damages the sums set out in 13 above and shall take all necessary action to restore her pension entitlements.
3. It shall pay her 10,000 Swiss francs in moral damages.
4. It shall pay her 7,500 Swiss francs in costs.
5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot E. Razafindralambo

A.B. Gardner

SEVENTY-NINTH SESSION

In re McLEAN **Judgment 1433**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gregor Adrian McLean against the European Patent Organisation (EPO) on 23 June 1994, the EPO's reply of 8 September, the complainant's rejoinder of 9 October and the Organisation's surrejoinder of 11 November 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who has both Australian and British nationality, joined the EPO on 1 December 1991 as an examiner at grade A3. On 28 April 1992 he stated on a standard form - No. 4340.1, headed "Entitlement to home leave" - that he wanted Harrow, in England, to be "the place for home leave". But in a letter of 23 March 1993 he asked a personnel officer to change his home to Sydney, in Australia, where his and his wife's families lived, and he explained that when he had filled up form 4340.1 he had not realised that he was free to take home leave in a country that was not a member of the Organisation.

In a note of 24 March the personnel officer promised to answer his request for the change as soon as it had been decided whether an official might change home from a place within the territory of a member State to a place outside. The complainant retorted in a note dated 25 March that what he wanted was not a change of home but mere correction of information he had put on the form by mistake. But the officer told him in a note dated 30 April that the Administration regarded his request as an application for change of home.

By a letter of 21 June 1993 to the President of the European Patent Office, the secretariat of the EPO, the complainant filed an internal appeal against the Personnel Department's refusal to let him correct the form and, subsidiarily, against its implied refusal to let him "change" his home country. The Director of Staff Policy informed him in a letter of 17 August that the President had referred the matter to the Appeals Committee.

The complainant having filled up a form applying for permission to take home leave from 15 to 30 November 1993 in Sydney, the head of Administration and Recruitment changed the entry in the form from "Sydney" to "Harrow" and added "Final decision pending".

By a letter of 7 January 1994 the Director of Personnel Administration told the complainant of a provisional decision to regard Sydney as his home "for the current 2 years' period".

On 5 May the complainant put in a claim to refund of the costs of taking home leave in Sydney, and the Administration gave its approval on 6 May.

After lodging the present complaint the complainant had notice of a final decision of 29 July 1994 from the Director of Personnel Administration confirming that his official home was Sydney. The Director of Staff Policy informed him in a letter of 16 August 1994 that since the decision of 29 July had given him satisfaction the appeal procedure was closed.

B. The complainant infers rejection of his internal appeal from the "protracted absence of any response from the Administration". The Administration led him to expect an explanation of the refusal of his claim "as soon as possible" but no explanation ever came.

He wants the Tribunal to have form 4340.1 corrected and his home changed from Harrow to Sydney. He also seeks awards of 1,500 German marks in moral damages and of 2,000 marks in costs.

C. In its reply the EPO contends that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress as Article VII(1) of the Statute of the Tribunal requires. His allegation that the Administration failed to respond is mistaken: it gave him provisional satisfaction in January 1994 and duly refunded in May the costs of travel to Sydney.

In subsidiary argument on the merits the Organisation contends that his main claim is devoid of merit because he no longer has any cause of action. Nor is there any basis to his claim to damages since he took home leave in Sydney and had his expenses paid. His claim to costs is "exaggerated".

D. In his rejoinder the complainant maintains that his complaint is receivable and objects to the Administration's unilaterally closing the internal appeal procedure. He denies that his main claim was met: the decision of 29 July 1994 laid down unacceptable conditions about the number of days he might take for travel and the amount of the refund he might claim. He says that the Administration fails to inform new staff of their rights and he presses his claims.

E. In its surrejoinder the EPO observes that there is nothing in the rejoinder to cause it to change its position. The Director of Staff Policy's letter of 16 August 1994 declaring the appeal procedure closed bears a date nearly two months later than the date of filing the present complaint. Not only is the complaint as a whole irreceivable but the complainant's challenge to the refund of travel costs and to the credit he was allowed for travel time is unrelated to the material issues and did not form part of his internal appeal.

CONSIDERATIONS:

1. The complainant, who was born in Australia, has Australian and British nationality. He joined the staff of the EPO on 1 December 1991. In the form headed "Entitlement to home leave" which he signed on 28 April 1992 he gave Sydney, in Australia, as the place where he had been brought up and Harrow, in England, as his place of residence and the place where he had property. He claimed entitlement to home leave in Harrow under Article 60 of the Service Regulations. In a letter of 23 March 1993 to a personnel officer he asked that his "place of home leave" should be Sydney on the grounds that that was the place with which he had the closest connection, that his wife was Australian, and that his wife's and his own parents, his wife's and his own brothers and their families and his own sister's family were all living in Australia. Having got no decision, he lodged an internal appeal on 21 June 1993. By a letter of 17 August the Director of Staff Policy told him that the President of the European Patent Office had refused his request and referred it to the Appeals Committee. On 29 July 1994 the EPO approved Sydney as his place of home leave and by a letter of 16 August the Director of Staff Policy informed him that "the appeals procedure has been closed".

2. Before the EPO approved Sydney as the complainant's place of home leave he had, on 23 June 1994, filed this complaint with the Tribunal seeking an order for the correction of the "Entitlement to home leave" form, an order that his country of origin be his country of home leave, and awards of damages

and costs. Although the form has not been corrected the complainant has had satisfaction in the recognition of his entitlement to take home leave in his country of origin. The only outstanding issues are therefore the receivability of his complaint and, if it is receivable, his claims to damages and costs.

3. As to receivability the EPO pleads that he has not exhausted the internal means of redress and should have awaited the outcome of his internal appeal before filing his complaint.

4. Article VII(1) of the Tribunal's Statute requires that for a complaint to be receivable the complainant must have "exhausted such other means of resisting a final decision as are open to him under the applicable Staff Regulations". The Tribunal recognises that reasonable time must be allowed for completing the internal appeal procedure. Yet in this case objections to receivability ill become the defendant. As was said in 1 above, it was on 23 March 1993 that the complainant asked that Sydney be recognised as his place of home leave. Although a personnel officer wrote the next day to tell him that he would be informed "as soon as possible" of the final decision, no decision was taken, and so on 21 June he lodged his internal appeal. Not until 17 August 1993 was he told that the matter was being referred to the Appeals Committee. On 24 August the chairman of the Committee wrote to him to say that his appeal would be "dealt with as soon as possible, bearing in mind the Committee's caseload and meetings timetable", that the Administration would "need to prepare a complete dossier" on the appeal, "together with the Office's comments on it", and that the probable date of hearing was May 1994. In spite of several requests by the complainant the EPO did not file its reply to his appeal until 19 September 1994 and thereby prevented the Appeals Committee from dealing with the matter.

5. In the meantime, on 31 January 1994, the Tribunal delivered Judgment 1324 (in re Rivero) on a similar case in which the EPO was a party. In that judgment the Tribunal made it clear how Article 60 of the Service Regulations should be construed and applied to staff with dual nationality like the complainant.

6. The complainant was kept waiting over sixteen months - until 29 July 1994 - for an answer to his request of 23 March 1993 and fifteen months for the EPO to file its reply of 19 September 1994 to his appeal of 21 June 1993 and so let the internal appeal procedure go ahead. The Tribunal holds that since he took all the steps he could take to obtain a final decision and since the EPO failed to discharge promptly its obligations under the internal procedure he was justified in coming to the Tribunal. That is in keeping with what the

Tribunal ruled in, for example, Judgment 1243 (in re Singh No. 2).

7. He claims an award of damages for "suffering caused by the refusal of an opportunity to correct a simple oversight". The Director of Personnel Administration informed him by a letter of 7 January 1994 of a "provisional" decision that he might take home leave in Sydney "for the current 2 years' period" but that the decision was not to be binding on the EPO "for whatever future final solution" it might take. The complainant then took home leave in Australia and has had his travel expenses reimbursed. He has failed to show any moral injury which would warrant an award of damages.

8. The conclusion is that the Tribunal need make no ruling on the place of the complainant's home leave. As to his further claims in his rejoinder, the Tribunal observes that, as the Organisation states in its surrejoinder, the complainant neither challenged the reimbursement of travel costs for home leave in Sydney in his internal appeal of 21 June 1993 nor set out the claims in the form introducing the present complaint. He has made the claims in internal appeals which are still pending, and the claims are therefore at present irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress. The Tribunal will, however, award him 500 German marks in costs.

DECISION:

For the above reasons,

1. The Tribunal need not rule on the complainant's claim as to the place of home leave.

2. The European Patent Organisation shall pay him 500 German marks in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

W Douglas
William Douglas

Michel Gentot
Michel Gentot

Mella Carroll
Mella Carroll

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner
A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re MALHOTRA (No. 2) — Judgment 1434

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 27 May 1994 and corrected on 10 June, the WHO's reply of 2 September, the complainant's rejoinder of 27 September as supplemented on 10 October 1994 and the Organization's surrejoinder of 17 February 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of India born in 1936, is on the staff of the WHO in its Regional Office for South East Asia (SEARO), where he holds grade ND.6. Further information on his career is set out under A in Judgment 1372 of 13 July 1994 on his first complaint.

In September 1991 the Administration put up for competition a post, No. 5.0027, for an "assistant II" in the personnel unit at grade ND.7. The complainant was one of 23 applicants. An ad hoc selection committee drew up a short list and submitted it to the Regional Director, who took the final decision. By a memorandum of 19 February 1992 the Regional Personnel Officer informed the complainant that his application had not been successful.

On 14 April 1992 he appealed to the regional Board of Appeal on grounds of personal prejudice, incomplete consideration of the facts and failure to comply with the rules and with the terms of his appointment.

The regional Board asked the Administration, among other things, to produce the papers it had submitted to the selection committee and to indicate whether the committee's members included a representative of the Staff Association. The Administration refused to provide the papers on grounds of privilege and said that no representative of the Staff Association had agreed to sit on the committee.

In its report of 29 March 1993 the regional Board confined itself to the matter of compliance with the material procedure and rules since it could not compare the candidates' qualifications. It concluded that there was not enough evidence to bear out the complainant's plea of personal prejudice but made no recommendation on his other pleas for want of the information it had sought from the Administration. By a letter of 20 April 1993 the Regional Director told the complainant of the rejection of his appeal.

On 21 May 1993 he put his case to the headquarters Board of Appeal. In a report dated 25 January 1994 it recommended by a majority of four to one upholding the Regional Director's decision. The dissenting member observed that it had had no more information from the Administration than the regional Board and so was no more able to make a recommendation.

By a letter of 28 February 1994, which he impugns, the Director-General endorsed the majority recommendation.

B. The complainant pleads discriminatory treatment and breach of the applicable rules. As in his previous case he says he is the victim of prejudice for having spoken out on behalf of the staff in several joint bodies. He mentions procedural flaws in reports appraising his performance and in the review of his applications for other vacancies.

In his submission the Organization failed to follow the proper selection procedure. Although Rule 410.4 says that for "posts below the level of director" selection shall "normally be on a competitive basis", a single official in the personnel unit decided on one applicant and sat on the selection committee so as "to justify his choice". The work of the committee being a mere "formality", the president of the Staff Association refused to have any part of it. But the president's absence amounts to a breach of procedure and invalidates the committee's recommendation.

The complainant further objects to the Administration's failure to make available to the regional Board the documents on which the selection committee relied. Only the personal opinions of members of the committee are privileged. Meeting as he does the highest standards of "efficiency, competence and integrity" required for promotion under Regulation 4.2, he believes that the WHO has tried to conceal the Regional Director's disregard of his seniority and the breach of the duty of care it owes him.

He asks the Tribunal to quash the appointment made to post 5.0027 and declare him the successful candidate; award 30,000 United States dollars in compensation for "grave injury, moral prejudice, mental torture, and loss of reputation"; and award him costs.

C. In its reply the WHO says that, though the complaint is devoid of merit, it is willing, in the light of Judgment 1372 and subject to the complainant's approval, to send the case back to the regional Board of Appeal, which will have the full records of the selection committee's proceedings.

The complainant has not produced a shred of evidence of personal prejudice. On the contrary, at a time when he was "particularly active" as a staff representative the WHO granted him three "exceptional" within-grade increments.

There was no formal or procedural flaw. That the same personnel officer acted at various stages of the selection does not explain why the Regional Director picked a candidate other than the complainant. If the Staff Association chooses not to have a representative on the selection committee the Administration may not order it to appoint one. Since Manual paragraph II.3.390 merely says that selection committees for General Service posts in regional offices must "normally" consist of four members, the absence of the president did not constitute a breach of procedure.

The impugned selection was a proper exercise of discretion. The complainant's seniority was but one of several criteria by which the Administration assessed his and the other 22 applications. The Regional Director did not overlook any essential fact and his choice showed none of the flaws that might warrant setting it aside.

D. In his rejoinder the complainant refers to what in his third complaint he alleges to be the WHO's failure to execute Judgment 1372 in full: if the Organization flouts a decision of the Tribunal's, how scrupulously can it be applying its own rules? He enlarges on his earlier pleas and accuses the Regional Director of overlooking the regional Board's inability to make a recommendation.

E. In its surrejoinder the WHO points out that the issues the complainant raises in his third complaint are immaterial. It was in his appeal to the headquarters Board that he should have raised his objections to the Regional Director's decision. As to his claim to the quashing of the decision the WHO points out that according to the case law the Tribunal will not assess candidates on merit.

CONSIDERATIONS:

1. In 1964 the complainant joined the WHO as a secretarial assistant at grade ND.5 in its Regional Office for South East Asia (SEARO) in New Delhi. His post was upgraded to ND.6 and he was promoted to that grade in 1979. His complaint is that the Organization did not select him for a post which fell vacant in September 1991 for an assistant at grade ND.7 in the personnel unit. He is asking the Tribunal to quash the selection, declare his own appointment to the post and award him damages for moral injury and costs.

2. He was one of 23 applicants for the post. He appealed to the regional Board of Appeal against the Regional Director's decision to appoint another applicant, pleading that that decision was based (1) on personal prejudice, contrary to Staff Rule 1230.1.1; (2) on incomplete consideration of facts, contrary to 1230.1.2; and (3) on failure to observe or apply correctly the Staff Regulations and Staff Rules and the terms of his contract, contrary to 1230.1.3.

3. As in the case which prompted the complainant's first complaint, and on which the Tribunal ruled in Judgment 1372, the regional Board of Appeal took the view that it could not "go into the comparative merits and ultimate quality of the individual applicants"; that it should consider only whether there had been compliance with the rules and procedures for the selection of staff; and that for the proper adjudication of the appeal it required the further information and documents which had been available to the selection committee, but which the Organization refused to provide on the grounds of confidentiality. So the Board was unable to make any recommendation on the complainant's pleas (2) and (3). The Regional Director rejected his appeal; he made an appeal to the headquarters Board; and the Director-General rejected it too on 28 February 1994.

4. It was on 13 July 1994, after he had filed this complaint, that the Tribunal delivered Judgment 1372 on his first one and therein affirmed that an item that formed part of the proceedings which had led to an impugned decision might not be withheld from the scrutiny of the Tribunal or of any internal appellate body.

5. On 2 September 1994 the Organization wrote a letter to the complainant and filed its reply to the complaint. In both its letter and its brief it stated that it accepted the Tribunal's ruling and agreed that the case should be sent back to the regional Board, and if need be to the headquarters Board, to enable them to take up the complainant's case anew

with full access to the records of the selection committee's proceedings. It suggested that the complainant should withdraw suit.

6. The complainant declined to do so, mainly from a mistaken belief that the Organization had not duly executed Judgment 1372 in that it had not revoked the selection he had impugned in his first complaint but had instead promoted the successful candidate. He did, however, also refer to the fact that the Tribunal might award him damages and costs.

7. For the same reasons as those stated in Judgment 1372, this case too must be sent back to the Organization for a fresh hearing of the complainant's appeal.

8. For the reasons it gives in Judgment 1435 delivered this day on the complainant's third complaint the Tribunal will not quash the impugned selection, and it cannot declare the complainant's appointment to the post in question.

9. Yet he was denied due process in the internal appeal proceedings, and for that he was entitled to redress. The Organization did not offer him any. The Tribunal will therefore award him 3,000 United States dollars in moral damages and 200 dollars in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 28 February 1994 is quashed.

2. The case is sent back to the Organization so that the regional Board of Appeal and, if need be, the headquarters Board may take up the complainant's appeal anew.

3. The Organization shall make available to the boards of appeal the full records of the selection committee's proceedings for the purpose of appeal.

4. It shall pay the complainant 3,000 United States dollars in moral damages.

5. It shall pay him 200 dollars in costs.

6. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas

P. Pescatore

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re MALHOTRA (No. 3)
(Application for execution)

Judgment No. 1435

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Kashmiri Lal Malhotra on 16 September 1994 for the execution of Judgment 1372, the reply of 17 November from the World Health Organization (WHO), the complainant's rejoinder of 12 December 1994 and the WHO's surrejoinder of 13 March 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant is employed in the WHO's Regional Office for South East Asia (SEARO). On 13 December 1990 he appealed to the regional Board of Appeal challenging the decision not to appoint him to a grade ND.7 post he had applied for in the Regional Office and asking that the selection of the successful applicant be quashed.

2. Having considered the Board's report the Regional Director rejected his appeal on 27 January 1992. The complainant having appealed to the headquarters Board of Appeal on 26 May 1992, the Director-General decided on 6 August 1993 to confirm the Regional Director's decision. That was the decision that the complainant impugned in his first complaint.

3. For the reasons set out in Judgment 1372 of 13 July 1994 the Tribunal quashed the Director-General's decision and awarded the complainant damages and costs. It sent the case back to the Organization to enable the regional Board, and if need be the headquarters Board, to take up the complainant's appeal anew and it ordered that the Organization make available to the boards of appeal the full records of the ad hoc selection committee's proceedings.

4. With effect from 1 September 1994 the Organization promoted to grade ND.8 the candidate whose selection the complainant had challenged in his first complaint.

5. On 9 September 1994 it paid the complainant the damages and costs awarded in Judgment 1372.

6. Since the Organization had not, despite the lapse of two months, yet referred the complainant's case to the regional Board the complainant filed this application on 16 September 1994 asking that the WHO be reprimanded and that:

(a) because the Director-General's decision of 6 August 1993 had been quashed the Organization should cancel the selection of the successful candidate, put him back on his former ND.6 post and stay his promotion to ND.8;

(b) proceedings should begin anew on the complainant's appeal as directed in Judgment 1372; and

(c) he should be awarded interest for one month on account of the delay in the payment of damages and costs.

7. There is no longer any dispute over interest, the Organization having paid him on 9 November 1994 interest at the rate of 10 per cent a year.

8. The effect of Judgment 1372 was to annul the internal proceedings subsequent to the complainant's appeal to the regional Board and the Director-General's conclusion of 6 August 1993 that the selection was in order. That meant only that the complainant's challenge to the process of selection had to be considered anew. He is mistaken in thinking that the judgment quashed the selection at once; if that were so, the Tribunal's order that the complainant's appeal be considered anew would have been superfluous. It is only after such reconsideration that the Organization will decide whether to withdraw the impugned selection. The selection will therefore remain in effect unless and until it is declared null and void. The claim fails.

9. The Organization submits that the promotion of the successful candidate to grade ND.8 was in accordance with its Staff Rules.

10. The complainant has not on any grounds challenged that promotion by way of an internal appeal and he has therefore failed to exhaust the internal remedies available to him. What is more, he has failed to show that he was adversely affected by the promotion. So the Tribunal will not in the context of this application determine whether or not the promotion was valid.

11. The WHO contends that because it has fully complied with Judgment 1372 the complaint is devoid of merit. It says:

> "Compliance with Judgment No. 1372 was confirmed by the complainant in his letter to the Organization's Director of Personnel, dated 7 September 1994 (nine days before the date of his complaint), in which he states, 'I am glad to note that you have decided to implement ... Judgment No. 1372, I believe in toto'."

12. The complainant made that statement in reply to the Organization's letter of 2 September 1994 which dealt, not with this matter, but with his second complaint, objecting to the selection made for another post. In that letter the Organization proposed by way of settlement that the complainant should withdraw that complaint, whereupon the regional Board would reconsider his appeal against that other selection.

13. The Organization made no unequivocal statement that his first appeal, which led to Judgment 1372, would be sent back to the regional Board. The complainant was justified in applying to the Tribunal after the lapse of two months for execution of the judgment. Only on 2 November 1994 did the Organization inform the complainant for the first time that his appeal had been returned to the Board for rehearing.

14. Though the Organization did not execute the judgment as promptly as it should have, the Tribunal will make no award of damages in view of the award it makes in Judgment 1434 of this day on the complainant's second complaint. It awards him two hundred United States dollars in costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant 200 United States dollars in costs.

2. His claim to damages is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas

P. Pescatore

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re SALA (No. 2) Judgment 1436

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Françoise Blanche Alice Sala against the International Telecommunication Union (ITU) on 8 June 1994 and corrected on 22 July, the ITU's reply of 14 September 1994, the complainant's rejoinder of 23 February 1995, the Union's surrejoinder of 7 April, the complainant's further submissions of 25 April and the Union's comments thereon of 10 May 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 11 of its Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1937, holds a grade P.5 post at ITU headquarters in Geneva. Until February 1993 the Secretariat had a Conferences and Common Services Department with several sections. The complainant was head of the French translation section.

By service order 79 of 13 November 1992 the Secretary-General announced reforms in the Department. As from 1 February 1993 it was split in two: the Conference Department, of which no-one was yet appointed head, and the Common Services Department, headed by Mr. Hans Pieterse.

A notice of 7 December 1992 announced the vacancy of the post of head of the Conference Department and by a letter of 9 December the complainant applied. On learning that the Secretary-General had appointed Mr. Pieterse, she challenged the decision in a memorandum of 11 January 1993. She also said she would be applying for the newly vacant post of head of the Common Services Department as soon as it was advertised.

The post was advertised in a vacancy notice of 19 April 1993. On 26 May the complainant sent in her application, but by a letter of 23 July 1993 the Chief of the Personnel Department told her she had been unsuccessful.

On 25 August 1993 she wrote to the Secretary-General asking him to reconsider that decision on the grounds that the successful applicant was no more competent than she and the ITU's policy on promotion discriminated against women.

The Secretary-General upheld his decision in a letter of 8 October 1993 and the complainant went to the Appeal Board on 6 January 1994. By a memorandum of 7 February 1994 the Deputy Secretary-General informed the chairman of the Board that the complainant failed to meet three of the requirements in the vacancy notice: she had no postgraduate university degree, lacked experience in the automation of an administrative department and had never headed a "large multicultural team".

In its report of 7 March 1994 the Board recommended rejecting the appeal. By a memorandum of 11 March to the complainant - the impugned decision - the Secretary-General upheld his decision.

B. The complainant has only one plea: sexual discrimination. In her submission the reasons the Deputy Secretary-General gave for rejecting her application do not hold water. The diploma she has is recognised as equivalent to a postgraduate university degree and she passed the United Nations competitive examination for translators. She believes that the requirement of formal qualifications applies foremost to outside applicants. The vacancy notice did not require experience in the automation of an administrative department but made it just an advantage. One duty listed in the description of her present post is "participating in the introduction of new working methods, particularly those involving electronic data processing". That she can head a "large multicultural team" is plain from her present duties and what she used to do as president of the Federation of International Civil Servants' Associations. So the conclusions the Secretary-General drew from the evidence were obviously wrong.

The Union is secretive over recruitment and wont to discriminate against women despite what many official resolutions say. At 31 December 1992, for example, women accounted for only 15.8 per cent of staff in the Professional and higher categories and none of them was above grade P.5.

She asks the Tribunal to quash the decision of 11 March 1994 and the appointment to the post and to order the Union to go through the process of selection properly. She claims moral damages and costs.

C. In its reply the ITU points out that in her memorandum of 11 January 1993 the complainant acknowledged she was "not quite ready" to head the Common Services Department.

It contends that she did not fulfil the requirements in the vacancy notice. She has no postgraduate degree. However good they may be, neither her academic qualifications nor her achievement in the examination for United Nations translators are relevant to any of the duties listed in the notice. The Union might have let that pass had she met all the other requirements, but she did not.

Introducing new working methods in the section she at present heads, even if they include data processing, does not amount to real experience in the automation of an administrative department.

She is not qualified to head a "large multicultural team". The staff in her section are all French-speaking and her experience of staff union work does not make up for her lack of that qualification.

As for her saying that recruitment is not open enough, Rule 20 of the Rules of Procedure of the Appointment and Promotion Board requires that the Board's proceedings be secret.

Lastly, her charges of sexual discrimination are unfounded. The Secretary-General has done his utmost to get women to apply for senior posts.

D. In her rejoinder the complainant says that her remark in the memorandum of 11 January 1993 was prompted by indignation and is irrelevant, the more so since at the time she did not know what qualifications the second vacancy notice would require. The Union does have a policy of discriminating against women and had a duty to explain in what respects the five applicants on the short list were better qualified than she. She asks the Tribunal in accordance with Article 11 of its Rules to order such measures of investigation as it deems fit to get the Union to submit a paper showing that those applicants were better qualified.

E. In its surrejoinder the Union refuses to provide a list comparing the complainant's merits with those of the short-listed applicants. It was for the Appointment and Promotion

Board, a joint body, to make such comparison, and the Board took the view that she did not meet the requirements in the notice. Rule 20 of the Board's Rules of Procedure allows unsuccessful applicants to ask why they were turned down.

F. In a further brief the complainant submits that the Appointment and Promotion Board is not a joint body.

G. In final comments the Union admits that no such body considered the complainant's application.

CONSIDERATIONS:

1. By a service order of 13 November 1992 the Secretary-General of the ITU announced reforms in the Conference and Common Services Department. The Department was split into two units, the Conference Department and the Common Services Department. The post of head of the Conference Department was put up for competition. The complainant, who was head of the French translation section, applied, but it was the head of the Common Services Department who won. Though the complainant objected she did not challenge the appointment and said she would be applying for the newly vacant post of head of the Common Services Department when it was put up for competition.

2. The Administration announced that vacancy by a notice of 19 April 1993. The successful applicant was to be in charge of logistics, library services, records, document reproduction and publications (composition, production, electronic publishing and sales). The notice set out the duties and stated the requirements to be a postgraduate degree, preferably in telecommunications or management; suitable experience, an advantage being experience in the automation of an administrative department; the ability to establish and maintain working relations at all levels and to plan, organise and supervise the work of a large multicultural team; and proficiency in English and French.

3. In her application for the post the complainant said that she met the requirements and she cited resolutions adopted by the General Assembly of the United Nations and recommendations by the International Civil Service Commission on the employment of women in international organisations. As she learned from a letter of 23 July 1993, however, she was unsuccessful. She asked the Secretary-General to review his decision on the grounds that the successful applicant was no

more competent and was less experienced than she and that to pass her over twice in favour of men who had less seniority and less experience was to discriminate against women. Upholding his decision, the Secretary-General answered her on 8 October 1993 that he had made his choice on the recommendation of the Appointment and Promotion Board and there was nothing discriminatory about the Union's policy. She then put her case to the Appeal Board. The Board recommended that the Secretary-General should not reopen the competition but took note of his promise to "continue trying to get more women to apply for posts in the Professional and higher categories at the ITU".

4. The complainant had notice in a letter of 11 March 1994 of the Secretary-General's endorsement of the Board's recommendation. That is the decision she is impugning, and her complaint is receivable. She seeks the quashing of the Secretary-General's decision and an award of moral damages. She sees sexual discrimination in the rejection of her candidature and by way of proof cites the irrelevance of the reasons the Secretary-General gave for it. Since she does not know why the Appointment and Promotion Board refused to put her name on the short list she asks the Union to produce a paper showing "how far each short-listed applicant met the stated requirements and was better qualified than she". The Union rejected her because it is determined to keep women out of senior posts as far as it can.

5. The Tribunal does not accept her view that she met all the requirements in the notice of 19 April 1993. She had no postgraduate degree and neither the diploma she does have nor the qualifying competitive examination she took is relevant to any of the areas of work the notice mentions. She had no experience in the automation of an administrative department and had never organised or led a "large multicultural team", even though in the course of her career she had come into touch with senior and other staff of many different nationalities. Although the Appointment and Promotion Board and then the Secretary-General did not treat any one of the criteria in the notice as decisive there was no mistake of fact or of law in their view that she fell short of some of the requirements for head of the Common Services Department, a senior post that called for quite particular administrative attainments.

6. She objects to secretiveness in the Union's procedures for recruitment and promotion and maintains that she was as well qualified as any of the short-listed applicants including the successful one. But the case law is plain: as was said for example in Judgment 1223 (in re Kirstetter No. 2), the Tribunal will not interfere with comparison of candidates in a competition. Only when it appears that the choice rests on a mistake of fact or law or that there has probably been

misuse of authority will the Tribunal order the defendant to produce further evidence so that it may review such comparison. In this case the complainant has offered no specific evidence to suggest that the ITU's assessment of the applicants may not have been objective and impartial. So the Tribunal will not order the Union to submit the paper she wants and it disallows her application.

7. Lastly, however regrettable it may be that there are too few women in senior posts at the ITU - and for that matter in most international organisations - the Tribunal is satisfied that the complainant was not discriminated against. There was no breach of the General Assembly resolution of 23 December 1992: the Secretary-General could not have used his authority to get her name put on the short list.

8. Since her pleas in favour of quashing the impugned decision are not sustained, her claims to damages and costs fail too.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot E. Razafindralambo

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re PARY (No. 3)

Judgment 1437

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Lazaro Pary against the World Intellectual Property Organization (WIPO) on 4 July 1994, WIPO's reply of 3 October, the complainant's rejoinder of 1 December 1994 and the letter of 11 January 1995 from WIPO's Legal Counsel informing the Registrar of the Tribunal that the Organization did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written evidence and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career in WIPO is set out under A in Judgment 1179. At the material time he was an operator of photocopy machines in the Reproduction Section of WIPO's General Administrative Services.

By a letter of 23 September 1993 the Director General informed him of a decision to transfer him under Staff Regulation 4.3(d) to a post as messenger-driver in the Conference, Communications and Procurement Section as from 1 October 1993. In a letter dated 15 October the complainant asked the Director General to review that decision. In the absence of a reply he lodged an internal appeal with the Appeal Board in a letter of 20 December 1993, asking the Organization to give him work that made the best possible use of his skills and personal qualities. In its report of 21 April 1994 the Board recommended that the Director General should uphold the decision of 23 September 1993 but restrict the job to messenger. In a memorandum of 29 April 1994 - the decision impugned - the Director General told the complainant that he endorsed the Board's recommendation.

B. The complainant submits that there are no objective grounds for his transfer and that it was ordered in response to pressure from his supervisors, who were bent on crushing him body and soul. It is unfair of WIPO to have transferred him four times, willy-nilly, supposedly "in the interests of the International Bureau", on the pretext of administrative reform, to the detriment of his health, career and personal interests and without heed to his rightful expectations and his background.

After fifteen years with the Organization he was made a messenger-driver - the lowest rung of the ladder - though he does not even have a "proper driving licence". That was a blow to his career and a lowering of his status.

What brought about the transfer was a letter he wrote to the Director of the Personnel Division on 5 July 1993 to complain of working conditions in the Reproduction Section. Though warranted, his grievance drew a fierce onslaught from supervisors and fellow staff alike. He cites several incidents, some of them going back years, as proof of their abiding dislike. They were wrong to blame him for getting a doctor from the United Nations Joint Medical Service to come and inspect the workplace. It was unfair too to charge him with disobeying orders.

In its report of 21 April 1994 the Appeal Board disregarded essential evidence he had adduced and factual proof of the formal and substantive flaws in the decision he was challenging. At the hearings the Administration put pressure on the doctor from the United Nations. In a medical certificate dated 21 March 1994 that doctor wittingly understated the complainant's ailments in incomprehensible and even suspect disagreement with his own doctors.

The description of the new messenger post was "trumped up" during the appeal proceedings and, in breach of the rules, the post has no grade.

He seeks the quashing of the Director General's decision of 29 April 1994 and transfer to a post similar to the one he held previously or any other corresponding to his "university education and linguistic skills". He asks for damages equivalent to the loss of salary resulting from his transfer and compensation for the "financial upgrading" of his former post. He claims moral damages in the sum of 60,000 Swiss francs and 10,000 francs in costs.

C. In its reply WIPO contends that the decision to transfer the complainant was taken intra vires and shows neither flaw nor mistake.

The Administration duly took account of his health and lack of a proper driving licence. It did not assign him the duties of a driver, which include the loading, unloading and carrying of parcels and other mail in containers, and the job description was drafted accordingly. But without a word of explanation he refused to sign it.

The Director of the United Nations Joint Medical Service gave him a check-up, made an enquiry and came to the view that he was fit enough to be a messenger.

There is no substance to his charges of hostility on his supervisor's part. More than once he himself had asked for transfer from his post in the Reproduction Section to one in which his working conditions would suit him and in which his qualifications might be put to better use.

The reasons for his transfer were the reform and modernisation of the Reproduction Section - which will mean doing away with many jobs - and the need for more messengers, drivers and guards in the Conference Section. The transfer was in the Bureau's interests and in his own too since his new duties were physically less taxing and not so stressful and offered better career prospects. With the overhaul of the Reproduction Section there will be new posts he can apply for. So he is wrong to say he has lost opportunities for advancement and promotion.

D. In his rejoinder the complainant maintains that the Organization's answer to his grievances will not do. The reasons it is giving now for his transfer do not square with the ones the Director General offered to the Appeal Board. It never found out the material facts before moving him and it tried to cover up later by changing the job description. It is untrue that a medical examination and the alleged enquiry by a United Nations doctor prompted a new description of his post.

CONSIDERATIONS:

1. The complainant used to be an operator of photocopying equipment in the Reproduction Section of WIPO. By a decision of 23 September 1993 the Director General transferred him to a post as messenger-driver in the Conference, Communications and Procurement Section. He objected to his transfer, the fourth in a short while, and asked the Director General to review the decision with due regard to his seniority, health, qualifications and age. Having got no answer, he went to the Appeal Board. In its report of 21 April 1994 the Board

recommended upholding the decision but restricting his new job to messenger. He is impugning the Director General's decision of 29 April 1994 endorsing the Board's recommendation. He wants a post like the one he had before or any that matches his training and skills. He claims damages under several heads.

2. WIPO Staff Regulation 4.3, which is about promotion and transfer, reads:

> "(c) 'Transfer' shall mean the assignment of a staff member to another post without promotion. A transfer may be effected without having recourse to a competition.
>
> (d) Any staff member may be transferred whenever the interests of the International Bureau so require. Any staff member may at any time request consideration for transfer in his own interest."

The material issue is whether the complainant's transfer was in the Bureau's interests, as WIPO maintains, or due to personal considerations which - he makes out - were actuated by a determination to "crush him body and soul" and a spirit of revenge for his behaviour.

3. The Tribunal is not satisfied on the evidence that there was anything improper in the Director General's deciding to transfer the complainant. The transfer was in the Organization's interests. It took several facts lawfully into account. One was the reform of the Reproduction Section. Another was the need for more messengers in the Conference Section to deliver mail and supplies to different parts of WIPO premises.

4. It may be a pity he was made a "messenger-driver" when it appears he had no proper driving licence and so could perform only some of the duties in the original job description. As the Appeals Board said, the Organization should have checked beforehand his qualifications for messenger-driver. But the Director General removed that formal flaw by deciding on 29 April 1994 to follow the Board's recommendation and by amending his job description. The mistake has caused him no injury because he has done only messenger work since transfer. Nor does the evidence suggest that he was too unwell to perform such duties.

5. He alleges harassment and even victimisation by supervisors and other staff. Whether sound or not, his grievances are immaterial to the impugned decision.

6. Nor is there any reason to suppose that his transfer was hidden disciplinary action or attributable to his staff union work: as was held in 3 above, it was taken in WIPO'S

interests. His allegations of flaws in reports on his performance and of delay in advancement have no bearing on this case: the transfer had plainly nothing to do with his behaviour, he kept his grade, and his prospects of promotion did not suffer.

7. In sum, his claim to the quashing of the transfer fails and so do his claims to damages and to reassignment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot E. Razafindralambo

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re OZORIO (No. 5) Judgment 1438

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Edmund Peter Ozorio against the World Health Organization (WHO) on 25 October 1994, the WHO's reply of 17 January 1995, the complainant's rejoinder of 30 January and the Organization's surrejoinder of 7 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States who was born in 1928, retired from the WHO in 1988. Facts relevant to this case are set out under A in Judgment 1367 of 13 July 1994 on his fourth complaint. In that judgment the Tribunal quashed a decision by the Director-General setting at 1 May 1995 the deadline by which he might exercise his right to remove household goods at the WHO's expense; the Tribunal sent his case back to the Organization for a new decision.

By a letter of 30 September 1994, which he impugns, the Director-General granted him up to one year from the date of receipt in which to exercise that right. The Director-General also told him that, being final, the decision was challengeable before the Tribunal.

B. The complainant submits that the impugned decision is "perverse and arbitrary". He pleads mistakes of fact and law.

By extending by five months the period set in the decision which the Tribunal quashed in Judgment 1367 the Director-General merely restated the WHO's general policy that removals should take place within one year of separation from service. But the material issue is whether the complainant's situation warrants discretionary extension of that limit.

The proper exercise of discretion requires the Director-General to consider the continuing employment at Geneva of the complainant's wife, a fact he has still failed to take account of. What is more, he wrongly concluded that the complainant's request had no bearing on his contractual ties with the WHO: but it was his transfer in 1977 to WHO headquarters at Geneva that led his wife to give up her career in the United States.

The Director-General's letter of 30 September 1994 refers to "the policy in effect" when the complainant retired, which restricted discretionary extension to two years beyond the usual time limit of one year. By relying on what was an unpublished policy at the time the Director-General has further erred in law.

It is true that all United Nations agencies have time limits for the removal of household goods. But the Director-General has failed to take into account the variety of the arrangements made for that purpose, and the complainant cites by way of example the International Labour Organization where, he says, the time limit may be as much as 12 years after separation, and extension is possible.

The complainant invites the Tribunal to quash the decision of 30 September 1994 and order the Director-General to take a new decision to allow him a "reasonable period" after his wife's retirement for the exercise of his right to reimbursement of removal expenses on repatriation. He also claims 2,000 Swiss francs in costs.

C. In its reply the WHO contends that the impugned decision was a proper exercise of discretion. The Director-General gave "consistent" reasons for it. That he did not regard as relevant the date of retirement of the complainant's wife does not make his decision arbitrary. The complainant's staying on in Geneva is a choice of his own that is unrelated to his former employment.

D. In his rejoinder the complainant comments on the Organization's reply and enlarges on his earlier pleas. The fact that his wife was not party to a contract with the WHO does not bar the Director-General from taking her employment into account. Indeed the rules of the United Nations stipulate that whenever a staff member's spouse works for it or another United Nations agency the normal time limit starts to run at the time of the spouse's separation.

E. In its surrejoinder the Organization maintains that it took account of the employment of the complainant's wife but did not regard it as a valid reason for extending the time limit. The WHO was not bound to be as "generous" as other agencies.

CONSIDERATIONS:

1. The complainant's claim is that the time limit for the refund of the costs of removal of his household goods to the United States be extended until the retirement of his wife, who is an employee in the Office of the United Nations High Commissioner for Refugees in Geneva.

2. The applicable Manual paragraph in force at the date of the complainant's retirement, 30 November 1988, allowed an exception to the requirement that removal should begin within one year of termination of employment, provided that the Chief of Personnel authorised the exception on the strength of written justification and the cost to the Organization was not increased.

3. The Organization extended the time limit for the refund of the costs of removal first to 30 November 1990, then to 30 November 1991. It refused to grant any extension beyond that date. The complainant lodged an internal appeal and the headquarters Board of Appeal recommended that the Director-General reconsider. In a decision dated 1 May 1993 the Director-General set 1 May 1995 as the new time limit. On 28 July 1993 the complainant filed his first complaint, which impugned that decision. In Judgment 1367 the Tribunal held that the Director-General's decision of 1 May 1993 was arbitrary and a wrong exercise of discretion not only because it failed to state the reasons for choosing 1 May 1995 as the new deadline for the refund of the costs of removal, but also because it gave no consistent reply to the complainant's claim. The Tribunal therefore quashed the Director-General's decision of 1 May 1993 and sent the case back to the Organization for a new one. By his new decision, which he conveyed to the complainant in a letter dated 30 September 1994, the Director-General extended the time limit to "one year from the date of receipt of this letter". The new deadline was thus 5 October 1995. That is the decision challenged in the present complaint.

4. The Director-General's letter of 30 September 1994, after referring to the relevant Manual paragraph, makes general statements about the rationale of time limits for the removal of household goods on repatriation. He makes the point that after a certain time the logical connection between the former staff member's presence at the former duty station and past employment ceases to exist and continued presence must be a matter of personal choice. He recognises the importance of the staff member's own needs and desires but observes that the policy embodied in the Manual paragraph is designed to accommodate them within reasonable limits. For reasons of proper management, he says, flexibility in individual cases must at some point give way to consistent policy.

5. The Director-General gives three specific reasons in his letter for further extending the time limit. The first is that the policy, now provided for in the Manual, of limiting any extensions to two years had not been incorporated into the Manual at the date of the complainant's retirement. The second is that "the three year time limit" - from the date of the complainant's retirement - "has expired". The third is that the Organization wishes to give him a "reasonable period" from the date of receipt of the letter to make arrangements for the removal.

6. The complainant submits that both the general and the specific reasons stated by the Director-General are illogical. He contends that the Director-General refused to regard his wife's employment as relevant and "misdirected himself in law" in treating it as irrelevant. He argues that the Director-General, having referred to the concept of setting time limits on claims throughout the United Nations common system, should have taken into account the flexibility with which allowance is made for the staff member's particular circumstances.

7. In accordance with its case law the Tribunal will not substitute its own views for those of the Director-General in a matter in which he has discretion. It is true that the reasons he gave in his letter were poorly stated, much of what he put forward as reasons for his decision being irrelevant. The simple issue which he had to determine was whether he should grant an extension by reason of the complainant's wife's employment in another United Nations agency and the prospect of her retirement in November 1996. In dealing with that issue he concluded that the reason for the complainant's continued presence in Geneva, his former duty station, was the fact that his wife was still employed there, but that was a personal reason which should not be allowed to lay any indefinite obligation on the Organization. Thus the Director-General did

address his mind to the particular circumstances of the case, including the employment status of the complainant's wife, but found other, countervailing factors relevant to his decision. His references to the setting of time limits in the United Nations common system for the refund of the costs of removal were intended to support his view that, for the sake of proper management, flexibility in individual cases must at some point give way to a consistent policy. He did not base his decision on the practice of other United Nations agencies.

8. The complainant has been unable to show any flaw in the Director-General's exercise of discretion which would warrant setting the decision aside. So the complaint fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas

Michel Gentot

Mella Carroll

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re VAN DER PEET (No. 19) Judgment 1439

THE ADMINISTRATIVE TRIBUNAL,

Considering the nineteenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 11 August 1994, the EPO's reply of 6 December, the complainant's rejoinder of 19 December 1994, the Organisation's surrejoinder of 1 February 1995, the supplement filed by the EPO on 29 March to its surrejoinder, the complainant's comments of 25 April on that supplement, and the Organisation's final comments of 2 May 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen, is employed by the EPO at its Directorate-General 4 in Munich as a patent examiner at grade A3. In October 1991 the Administration started disciplinary proceedings against him on the grounds of breach of Article 14 of the Service Regulations. Further information on those proceedings and the sanction later imposed on him appears under A in Judgment 1391 on his eighteenth complaint.

In a letter dated 19 August 1993 he asked the President of the European Patent Office, the secretariat of the EPO, for information about a promotion he was expecting to grade A4 in 1993. By a letter of 28 September 1993 the President told him that a staff member could not "in principle" be promoted as long as there was any reference to a disciplinary measure in his personal file.

The complainant appealed against the President's decision on 30 September 1993. In its report of 31 May 1994 the Appeals Committee recommended rejecting his appeal.

By a letter of 6 July 1994, which he is impugning, the Director of Staff Policy told the complainant that the President had decided to endorse the Committee's recommendation.

B. The complainant submits that to deny him promotion is unlawful. He has two sets of pleas. The first set, which is summed up under B and D in Judgment 1391, seeks to establish that the disciplinary measure on which the impugned decision rests is "null and void". His other pleas are confined to flaws which, he alleges, taint the impugned decision itself.

The Administration acted in breach both of the rule against double jeopardy and of nulla poena sine lege by imposing a "further punishment" on him for which there is no provision in the Service Regulations. Law-making authority being vested in the Administrative Council, the President's decision was ultra vires.

There was a procedural flaw in the conduct of the internal appeal. The complainant asked the Appeals Committee to bar members of the Legal Department from the proceedings because of their "personal interest" in victimising him. The Committee's refusal is evidence that it is at the President's "beck and call".

He seeks promotion to grade A4 as from "the date on which the Promotion Board recommended such promotion", compensation for "pecuniary loss and damages caused by his illegal exclusion from promotion", 50,000 German marks in moral damages and 6,000 marks in costs.

C. In its reply the EPO maintains that the impugned decision was a proper exercise of discretion. Promotion is a reward for general performance, and that includes "conduct" as well as carrying out duties. Since the disciplinary measures set out in Article 93(2) of the Service Regulations do not include "non-promotion", the complainant is wrong to treat it as a hidden disciplinary sanction. Besides, if he changes his "attitude" he will be eligible for promotion "before long".

As to his attacks on the Appeals Committee the EPO points out that the Committee is an independent body that conducts its hearings as it sees fit.

D. In his rejoinder the complainant refutes the Organisation's submissions and presses his claims. Whatever change in "attitude" the Administration may expect of him, such a condition is arbitrary.

E. In its surrejoinder the EPO observes that in deciding whether to promote an official whose performance appraisals, seniority and age qualify him for promotion the President is free to rely on such other criteria "as are justified". The attitude the Administration expects from the complainant is one in keeping with his "position and obligations" as an international civil servant.

F. In its supplementary brief the Organisation informs the Tribunal that in the light of Judgment 1391 it promoted the complainant, by a decision of 24 February 1995, to grade A4 as from 1 July 1993.

G. In comments on that brief the complainant maintains that the promotion to grade A4 as from 1 July 1993 fails to give him satisfaction: the Administration should have promoted him as from 1991 or, subsidiarily, 1992.

H. In its final comments the Organisation points out that the present dispute concerns the complainant's promotion in 1993. His new claims to promotion as from 1991 or 1992 are irreceivable.

CONSIDERATIONS:

1. The complainant was the subject of disciplinary action consisting in relegation in step within his grade as from 1 April 1992. In his eighteenth complaint, which he filed on 17 March 1994, he appealed to the Tribunal against the decision, and that complaint was pending at the date when he lodged this one.

2. By a letter of 19 August 1993 he had claimed promotion to grade A4 in 1993. But, even though he fulfilled the requirements as to record of performance, reckonable experience and age, the President of the European Patent Office explained in a reply of 28 September 1993 that he had decided because of the disciplinary measure not to promote the complainant to A4 in 1993. On 30 September 1993 he lodged an internal appeal against that decision and on 22 November his appeal was referred to the Appeals Committee. In its report of 31 May 1994 the Committee unanimously recommended rejecting his appeal. The President accepted the recommendation and by a letter of 6 July 1994 the Director of Staff Policy informed him that the President had decided, "for the reasons set out during the appeals procedure and in accordance with the unanimous opinion of the Committee", to reject his appeal. That is the decision he impugns.

3. In Judgment 1391, which it delivered on 1 February 1995, the Tribunal allowed Mr. van der Peet's eighteenth complaint. It held that only if the staff member's conduct amounted to abuse of process or to perversion of the right of appeal would disciplinary action be justified. So it set aside the impugned decision to impose the disciplinary penalty on the complainant.

4. On 24 February 1995 the President of the Office decided in the light of Judgment 1391 to promote the complainant to grade A4 with effect from 1 July 1993. The complainant received the text of that decision on 1 March 1995 and the EPO informed the Tribunal of it in the supplement dated 29 March to its surrejoinder.

5. The relief which the complainant seeks is:

(1) promotion to A4 as from the date "on which the Promotion Board recommended such promotion";

(2) material damages;

(3) moral damages amounting to 50,000 German marks; and

(4) costs amounting to 6,000 marks.

6. The complainant does not specify the date which the Promotion Board recommended for his promotion, and it is not clear from the file. But in a letter he wrote to the Director of Personnel Administration on 1 March 1995 after receiving notice of promotion he asked that the effective date should be 1 January or 1 July 1991 or, "as an auxiliary request", 1 January or 1 July 1992; failing that, his letter was to be treated as an internal appeal. By a letter of 26 April 1995 the Director of Staff Policy informed him that his claims were rejected and were being referred to the Appeals Committee. That internal appeal is still pending.

7. In his further comments of 25 April 1995 to the Tribunal he says that promotion only as from 1 July 1993 does not give him satisfaction. But, as the Organisation has pointed out in its final brief, what he asked for in his letter of 19 August 1993 was promotion to A4 in 1993, that was the subject of his internal appeal of 30 September 1993, and that too is the subject of the present complaint.

8. The grant of promotion with effect from 1 July 1993 is an administrative decision which the complainant was entitled to challenge and has challenged. If the date recommended by the Promotion Board for his promotion was 1 July 1993 or some later date the complainant has received full satisfaction of claim (1). If the recommended date was earlier than

1 July 1993, the question arises whether the President should have accepted it. There are also the complainant's new claims - in his letter of 1 March 1995 mentioned in 6 above - to promotion as from 1991 or 1992. Those matters now arise in the context of his internal appeal against the President's decision of 24 February 1995.

9. Insofar as this complaint is concerned - apart from the matter of the date of promotion, which must await the outcome of the internal appeal procedure - the complainant has received satisfaction in the form of promotion, which will automatically carry the right to payment of arrears of pay. That affords him adequate compensation. As to his claim to moral damages, there is no reason to award him any. The delay in granting him promotion caused him no moral injury because the Organisation acted in good faith in originally deciding not to promote him.

10. The complainant is entitled to costs, and the Tribunal sets the amount at 500 German marks.

DECISION:

For the above reasons,

1. The complainant is awarded 500 German marks in costs.

2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

SEVENTY-NINTH SESSION

In re CERIBELLA   Judgment 1440

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Giulio Ceribella against the European Patent Organisation (EPO) on 16 May 1994, the EPO's reply of 12 August, the complainant's rejoinder of 17 September and the Organisation's surrejoinder of 22 November 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian citizen who was born in 1945, joined the EPO on 1 September 1986 as an assistant examiner at Directorate-General 1 (DG1) at The Hague. On 1 September 1991 he was transferred to Directorate-General 2 (DG2) at Munich as an examiner.

In the twelve weeks following his arrival in Munich he took thirteen days' unauthorised sick leave and fifteen days' unauthorised annual or special leave. From 6 March 1992, he provided the EPO with medical certificates and was again on sick leave during which, without permission, he was in Italy. Having refused several times to comply with orders from the President of the European Patent Office, the secretariat of the EPO, that he should see the medical officer, he went back to Munich on 6 May for a check-up. The medical officer referred him to a psychiatrist who diagnosed acute depression. He was then granted periods of sick leave as prescribed by several doctors whom he had seen in Munich.

On 19 August 1992 the EPO received from him a medical certificate issued by a doctor in Italy. It sent him a telegram on 21 August asking him to report to Munich for examination by the EPO's medical officer, but he refused. On 3 September he applied for referral of his case to the Invalidity Committee.

By a telegram of 7 September 1992 the EPO informed the complainant that he would in future be considered absent without leave and the time of any such absence would be deducted from his annual leave entitlements in accordance with Article 63 of the Service Regulations. By a letter of 9 October the Director of Personnel told him that he had exhausted his annual leave and that payment of his salary would be stopped at 10 October, again in accordance with Article 63. On 19 October he gave the complainant the name of the doctor designated by the President and told him that the Invalidity Committee would be called to decide under Article 62(7) of the Service Regulations whether to extend his sick leave, which on 23 October had reached the maximum allowed under 62(6). In its report of 12 January 1993, which one of its members did not sign until 3 February, the Invalidity Committee decided to extend the complainant's sick leave from six to eight months. It took the view that he was not suffering from any illness that entitled him under Article 62(7) to payment of full salary after expiry of the maximum duration of sick leave. The report was notified to him on 10 March 1993.

By a letter of 22 January 1993 the President had informed him of the start of disciplinary proceedings under Article 93(2)(f) for dismissal on the grounds - among others - that he had refused several times to see the medical officer. But by a letter of 22 April 1993 the Director of Personnel told the complainant's counsel that the President had decided to suspend the proceedings "on purely legal grounds" and that full salary would be paid for the period from 10 to 23 October 1992 and half of it thereafter. By a letter of 23 April 1993 counsel asked the Director of Personnel to pay the salary in full as from 23 (sic) October 1992; unlike the Invalidity Committee the complainant believed he did have one of the illnesses mentioned in Article 62(7). By a letter of 29 April 1993 the Director refused to comply with the request, and on 10 June the complainant lodged an internal appeal with the Appeals Committee against that decision.

On 20 September 1993 the Invalidity Committee met again and concluded that he was suffering from permanent invalidity within the meaning of Article 90(1) of the Service Regulations and that he was therefore unfit for his duties. He was separated from service and paid an invalidity pension from 1 October 1993.

In its report of 5 January 1994 the Appeals Committee, though giving no opinion on the nature of his illness, found that the halving of salary had been applied retroactively from

23 October 1992 to 15 March 1993. It held that he was entitled to full salary for that period. It recommended considering payment to him of the costs of travel to attend the hearings and pointed out the delay in convening the Invalidity Committee. By a letter of 21 February 1994 the Director of Staff Policy informed him that the President had rejected his appeal. That is the decision he is challenging.

B. The complainant endorses the arguments and conclusions in the Appeals Committee's report of 5 January 1994. By deciding on 22 April 1993 to halve his salary as from mid-October 1992 and thereby applying the Invalidity Committee's conclusion to a period prior to 10 March 1993, the date when he had had its report, the EPO disregarded the rule against retroactivity.

The EPO was to blame for the delay in producing the Invalidity Committee's report. The decision to convene the Committee was taken only four days before the complainant's entitlement to sick leave expired. Furthermore, the Organisation did not invite him either to appear before the Committee or to consult the medical officer "acting as a member of the Committee".

He seeks payment of his full salary for the period from 23 October 1992 to 15 March 1993, plus interest, and the refund of the expenses he incurred for travel to Munich to attend the Appeals Committee's meeting on 14 December 1993.

C. In its reply the Organisation observes that the complainant is no longer challenging the Invalidity Committee's conclusions in its first report about the nature of his illness. It further submits that the retroactivity of the decision of 22 April 1993 is more apparent than real. Article 62(7) of the Service Regulations lays down the general rule that an employee who has sick leave extended beyond the maximum period is paid half his salary and a special rule that in limited circumstances he may be paid in full. Since the Invalidity Committee made no decision on the nature of the complainant's illness, only the general rule applies. Otherwise, and if the Committee were to consider that the employee was not suffering from one of the illnesses in Article 62(7), the complainant would have to reimburse the overpayment. So his salary was reduced not because of the decision of 22 April 1993 but because the general rule in 62(7) was applied as from 24 October 1992. There was therefore no breach of the rule against retroactivity.

The Organisation points out that the complainant persistently refused to turn up for medical examination at the Office and spent much of the period of sick leave, without prior permission, in Italy. It submits that it cannot be held liable for the delay in the proceedings that culminated in the Invalidity Committee's decision. In answer to the complainant's request for a meeting of the Committee the Director of Personnel sent him a letter on 19 October 1992, i.e. within the deadline in Article 106(2) of the Service Regulations, giving the name of the doctor designated by the President.

The Organisation submits that the complainant's main claim is unfounded and it asks the Tribunal to reject his claim to the costs of travel to Munich to attend the appeal hearings on 14 December 1993.

D. In his rejoinder the complainant maintains that the reduction in pay was due to the decision of 22 April 1993. He asked for a meeting of the Invalidity Committee on 3 September 1992, one month and twenty days before his sick leave entitlements expired. But not until 22 April 1993 did the Director of Personnel take his decision in response to the Committee's first report. He notes that the letter of 10 March 1993 sending him the report makes no mention of Article 62(7). He sees that as evidence of the EPO's intention to dismiss him - a letter of 22 January 1993 from the President having told him that disciplinary proceedings were under way - so that applying 62(7) would be pointless.

E. In its surrejoinder the Organisation repeats that the decision of 22 April 1993 was not retroactive. The President's letter of 22 January 1993 was not notice of dismissal. The complainant's conduct warranted disciplinary proceedings. Not until he had read the Invalidity Committee's first report did the President reconsider the complainant's case and decide to stop those proceedings.

CONSIDERATIONS:

1. The complainant joined the EPO as an assistant examiner at The Hague in 1986 and was transferred to its office in Munich as an examiner in 1991. He is impugning its decision to pay him only half salary for the period from 24 October 1992 to 15 March 1993 - described below as "the relevant period" - when ill health kept him off work.

2. Paragraphs 6, 7 and 11 of Article 62 of the Service Regulations read:

> "(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.
>
> (7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 1, whichever is the greater. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of his basic salary."
>
> "(11) Where a permanent employee is recognised by the Invalidity Committee to be permanently incapable of performing his duties, his sick leave shall be extended until the first day of the month following the decision of the Invalidity Committee and paragraphs 7 to 10 shall continue to apply until that date. Thereafter, the provisions of the Pension Scheme Regulations regarding invalidity pension shall apply to him."

3. By 23 October 1992 the complainant had taken the maximum of twelve months' paid sick leave to which he was entitled under Article 62(6). He continued to be absent from work thereafter but the Organisation made him no payment, pending the report of the Invalidity Committee.

4. It was only on 15 March 1993 that he was given a copy of the Committee's report, dated 12 January 1993. It found him to be suffering from "serious neurotic depression" which had not responded to treatment and to be unfit for work because of "depressive psychic illness". The Committee recommended sick leave for six to eight months and a further medical examination if he did not resume work by 15 August 1993. It concluded by a majority that his was not a "serious illness in the meaning of

a schizophrenic psychosis, a cancer or similar health damages, that demand attacking treatment methods and [cause] loss in quality of life".*

5. On 22 April 1993 the Organisation decided to put the complainant on half salary under Article 62(7) with effect from 24 October 1992. He continued on half salary until 30 September 1993. In a second report dated 30 September the Invalidity Committee declared him to be permanently incapable of performing his duties. He was accordingly relieved of duty and paid an invalidity pension from 1 October 1993. On that score there is no dispute.

6. By a letter dated 10 June 1993 the complainant appealed to the Appeals Committee claiming payment of full salary from 24 October 1992 on the grounds that his incapacity was due to a serious mental illness within the meaning of Article 62(7).

7. In its report of 5 January 1994 the Appeals Committee held:

(a) It was not competent to decide whether the complainant had been suffering from a serious mental illness, that being a medical question to be decided by doctors.

(b) The date at which the first decision of the Invalidity Committee took effect was 15 March 1993, the date at which he had received it, and the Organisation had wrongly made that decision retroactive by reducing his salary as from an earlier date.

(c) That decision was correctly applicable to the period from 16 March 1993, for which he was entitled only to half salary.

The Committee recommended that he be paid full salary for the relevant period and should be granted the costs of travel to attend the hearing of his appeal.

8. By a letter of 21 February 1994 the Director of Staff Policy informed him that in the President's view the first decision of the Invalidity Committee had no retroactive effect and the appeal therefore failed. That is the impugned decision.

---

* The translation from the German is the complainant's.

9. The complainant adopts the Appeals Committee's reasoning and conclusions and claims payment of full salary for the relevant period on the sole grounds that the Invalidity Committee's first decision was wrongly made retroactive. Since he does not found the claim on "serious illness", nor allege any flaw in the finding that his was not a serious illness, the Tribunal will not consider those matters.

10. The complainant had exhausted his entitlement to paid sick leave by 23 October 1992. He would become entitled under Article 62(7) to further sick leave either (a) on full salary, if the Invalidity Committee determined that his incapacity for work was due to a serious illness; or else (b) on half salary, but only for any period by which the Invalidity Committee extended his sick leave. Thus at 24 October 1992 he had no immediate entitlement to further sick leave, on full or half salary: any such entitlement arose only if and when the Invalidity Committee decided in his favour. That decision did not take away a pre-existing entitlement, but on the contrary created the entitlement with effect from 24 October 1992. Thus the rule against retroactivity has no application in this case, and the claim fails.

11. Since the complaint does not succeed on the merits, the claim to payment of travel expenses is disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re SOCK

Judgment 1441

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tabaski Sock against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 6 June 1994 and corrected on 26 August, the Organization's reply of 20 October 1994, the complainant's rejoinder of 7 January 1995 and UNESCO's surrejoinder of 31 March 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to allow his application for the hearing of fifteen witnesses, which on the strength of the evidence before the Tribunal is unnecessary;

Considering that this case arises out of the dismissal of the complainant on the grounds of serious misconduct while he was under a permanent contract with the Organization and that the parties' claims are as follows:

The complainant:

1. The quashing of the Director-General's decision to dismiss him;
2. his reinstatement and the award of arrears of pay as from 28 April 1989, when he was suspended from duty;
3. an award of 2 million French francs in damages, even if he is reinstated;
4. an award of 100,000 francs in costs.

The defendant

The dismissal of the complaint.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is from Senegal, joined the staff of UNESCO on 1 February 1979 as an administrative assistant. As from 1 August 1981 he held a post at grade L.6 in the Organization's Regional Office for Education in Africa at Dakar under a fixed-term appointment which was regularly extended and was to expire on 31 July 1990. After an investigation in the Regional Office by the Inspectorate-General between 19 and 28 April 1989 he was charged with the embezzlement of funds for a seminar which UNESCO had held at Lagos from 20 to 31 March 1989. On 28 April he was summarily suspended from duty. In August the Administration put his case to the Joint Disciplinary Committee. On 12 October it gave him notice of further charges, namely that he had received undue payment at a seminar at Conakry in November 1988. On 19 January 1990 it summarily dismissed him on grounds of serious misconduct and confirmed the decision on 30 January. He appealed to the Appeals Board on 12 July 1990 and submitted a brief to it on 1 October. In its report of 14 January 1994 the Board recommended reversing the decision, but by a letter of 7 March 1994 the Director-General told the complainant that he was upholding it. That is the decision under challenge.

B. The complainant alleges that the membership of the Joint Disciplinary Committee was against the rules: for one thing, only officials from his own duty station should have been chosen. The Administration impaired his right to a hearing in the disciplinary proceedings. UNESCO gave no reasons for the summary dismissal of 19 January 1990, nor for the decision of 30 January 1990 confirming it, nor even for the one of 7 March 1994 rejecting the Board's recommendation. He denies the charges.

C. UNESCO replies that there was nothing wrong with the membership of the Disciplinary Committee. The complainant had his say at every stage of the proceedings. The reason for summary dismissal was obviously the proven acts of embezzlement he committed.

D. In his rejoinder the complainant enlarges on his pleas and points out that he was just a subordinate in the administrative unit of the Regional Office.

E. In its surrejoinder the Organization maintains that the complainant's pleas are devoid of merit, presses its own case and contends that he was in gross breach of duty.

CONSIDERATIONS:

1. The complainant, a citizen of Senegal, used to work for UNESCO as an accountant at grade L.6. He held the title of administrative assistant in the Regional Office for Education in Africa at Dakar. He seeks the quashing of the Director-General's decision to dismiss him at 19 January 1990 for serious misconduct.

2. The Regional Office recruited him in 1979. At first he held short-term appointments and then, from 1 August 1981, fixed-term ones that it regularly extended. At the material time he held his fifth such appointment, and it was to run from 1 August 1988 to 31 July 1990.

3. UNESCO sent out to Dakar two members of its Inspectorate-General at headquarters, Mr. Dan Spiers and Mr. Martin Shio, and from 19 to 28 April they carried out a general audit of administrative and financial management in the Regional Office. Their suspicions were aroused by the accounts of a seminar on education in demography which UNESCO had held in Lagos from 20 to 31 March 1989. The complainant had managed the financing of the seminar. The inspectors saw him in the presence of his supervisor and made an audit. Their conclusion was that he had forged signatures in the accounts and had cheated the participants of sums due by way of daily subsistence allowance by tampering with the prices of hotel rooms.

4. On 28 April 1989, before they left Dakar, the inspectors told the Director of the Regional Office of their findings, which concerned two officials implicated in fraud: Mr. Sock over the seminar at Lagos and Mr. Kwame Amoako-Tuffuor over one that the Organization had held at Conakry in November 1988. Whereas they needed further inquiry into the case against Mr. Tuffuor, the inspectors asked the Director to suspend the complainant from duty forthwith since in any event his performance was not good enough to warrant keeping him on. The Director's comment was that this was not the first time that the complainant had come under suspicion for financial misdemeanour; indeed some time earlier he had been relieved of the handling of petty cash.

5. By a decision of even date, 28 April 1989, the Director suspended the complainant from duty, albeit on full pay.

6. Once the inquiry was over the Organization decided to convene the Joint Disciplinary Committee at headquarters. The complainant was summoned before the Committee in Paris in October 1989. On 10 August, before he left Dakar, he was given a document dated 4 August setting out the charges against him over the seminar at Lagos. On 12 October, in Paris, he was given the text of the charges over the one at Conakry.

7. The Committee heard him on 16 October 1989. The inspectors who had gone to Dakar on mission were present. The Committee concluded that in the "lax administrative environment" of the Dakar office "the evidence as it now stands does point to the defendant's responsibility for the charges made against him". But the Committee added that it did "not wish to draw clear-cut conclusions as regards the extent of such responsibilities". So pending further inquiry it would make no recommendation.

8. Having got the Committee's report, the Director-General decided to dismiss the complainant. His decision was notified to the complainant in a telex of 19 January 1990 and confirmed in a letter dated 30 January from the Director of the Bureau of Personnel. The letter said that the Director-General had dismissed him under Staff Regulation 10.2 and Rule 110.1(a) and ordered him to pay back the amount which he had embezzled over the seminar at Lagos and which came to 941 United States dollars.

9. He submitted a brief on 1 October 1990 to the Appeals Board. UNESCO entered a reply on 14 December 1990. The complainant failed to attend hearings at the date originally set, 24 November 1992, and the Board summoned him again to hearings on 23 August 1993. This time he turned up, and he put his own case. The Board's report of 14 January 1994 goes in great detail into the charges and his replies. Though the Board did not question the Disciplinary Committee's finding of "obvious" financial mismanagement it made no unanimous recommendation: a majority of three members were not satisfied that the charges of embezzlement were proven beyond any doubt and recommended reversing the dismissal on the grounds of "presumption of innocence".

10. The chairman and another member of the Board were in the minority and explained their views at length in a dissenting opinion. They believed that the accounts the Board had seen were not up to the rudimentary standards of clarity and openness that book-keeping should meet. The minority thought it proved beyond peradventure that signatures had been forged,

that some of the documents had been erased and rewritten and that the complainant had made out more than one original for a single operation and then tampered with them. Even though it was in doubt whether he had made any gain for himself, the attempt at defrauding the participants in the Lagos seminar was proven. Moreover - said the minority - the complainant's mishandling of the accounts had caused the Organization moral injury, and that alone was misconduct serious enough to warrant dismissing him. Lastly, the minority took the view that papers found in his office after his suspension from duty showed collusion in similar acts with Mr. Tuffuor over the Conakry seminar.

11. The complainant asked the Director-General to reverse the dismissal in the light of the Board's report and to grant him damages. But the Director-General answered in a letter of 7 March 1994 that after careful reading of the report his final decision was to reject the appeal. That decision and those of 28 April 1989 and 30 January 1990, are at issue in this case.

12. The complainant lodged his complaint on 6 June 1994. He has two sets of pleas:

(a) pleas on issues of form, in which he objects to the membership of the Joint Disciplinary Committee and says that he was denied his right to reply and that UNESCO failed to state reasons for the suspension from duty and the dismissal;

(b) pleas on the merits for which he draws support from the Appeals Board's report: he denies the charges against him and asks the Tribunal to hear witnesses.

13. The Organization observes that it dismissed him for "serious misconduct" under Staff Regulation 10.2 and Staff Rule 110.1(a). It submits that, though those provisions would have allowed it to dismiss him without further ado, it carried out a proper inquiry in strictest observance throughout of his right of defence. In its submission the facts warranting the decision were proven and the lawfulness of it is unimpeachable.

The issues of form

14. The Appeals Board went thoroughly into the complainant's pleas on issues of form and rejected them. Since he is not objecting to the Board's proceedings as such there is no need to say more than what follows.

15. The Tribunal is satisfied on the evidence that the complainant's right to a hearing was scrupulously observed throughout the disciplinary proceedings. As soon as the books

were found wanting the inspectors from headquarters questioned Mr. Sock about the written evidence in his supervisor's presence. He was given notice of the charges in writing before he was to attend the Joint Disciplinary Committee's hearings. He had enough time to prepare his case, including his answers to the allegations about the seminar at Conakry. Though he saw the inspectors at the disciplinary hearings and had to answer their questioning, they were not members of the Committee as, from a misunderstanding of the procedure, he makes out. Though evasive on the merits, the Committee is quite explicit that his rights as defendant were observed. And the appeals procedure afforded him yet another opportunity of defending himself at a point in the proceedings by which everyone concerned knew well what the case was about.

16. Quite apart from that issue the complainant objects to the very membership of the Committee. He observes that it was set up at headquarters, and that was in breach of Staff Rule 110.2(d), which required - since this was the case of a field official - that it be made up of staff from the Regional Office. The answer to the objection is that, though committed to writing for the sake of sound administration, the rule is not binding. It leaves the Administration free to set up a disciplinary committee at headquarters whenever it sees good reason to do so. In this case the Regional Office felt that the misconduct the complainant was charged with could not have taken place without inside connivance. So the Organization had every reason to hold the disciplinary proceedings at headquarters. In any event the complainant has failed to show how the membership of the Committee might have proved prejudicial to the proper and independent consideration of his case.

17. Next comes his plea that UNESCO gave no reasons. Although an explanation of the reasons for an administrative decision affords an essential safeguard of the staff member's rights, consistent precedent has it that the form the explanation takes will depend on the nature of the decision and the context in which it is taken. Here UNESCO is right in stating that each successive decision, from the provisional suspension from duty to the final act of dismissal, was taken in a context that the complainant was quite well aware of. The suspension came after the questioning of him by the inspectors; the dismissal after the report by the Disciplinary Committee; and the final confirmation of dismissal after the Appeals Board hearings. The text of each decision so explicitly cites the material background that he may not properly contend he was caught unawares or profess ignorance of the reasons for each decision and what it meant.

The merits

18. What then was the justification of the dismissal on the merits? One preliminary point is that the complainant held a fixed-term appointment. His proven shortcomings and misconduct were undoubtedly such that the Organization might have refused without further ado to extend his appointment. As the Tribunal has always acknowledged, an organisation has discretion in the matter and, as many rulings bear out, it may refuse renewal on grounds of unsatisfactory performance or misconduct: for a recent example see Judgment 1405 (in re Moore).

19. Here UNESCO resorted to formal disciplinary proceedings because it wanted to bring an end forthwith to its contract with the complainant on account of behaviour it saw as incompatible with efficient administration and as harmful to its good name. The upshot was that it was able to end his appointment six months before expiry: it says in its surrejoinder that it kept him on the payroll until January 1990 whereas his contract was to run until 31 July of that year. So that is all that is at stake in this case.

20. The Tribunal does not agree with the majority of the Appeals Board. It is satisfied that the Director-General's decision was fully warranted by the facts that came to light at the various stages of the disciplinary proceedings. Even though doubts lingered as to whether the complainant gained at the expense of participants in the Lagos seminar and even though Judgment 1251, on Mr. Tuffuor's complaint, put into perspective the facts relating to the Conakry seminar, the way he kept the books was still inadmissible and can only have been intended to cover up actual fraud. In view of the complainant's earlier record, which was mentioned above, and his poor performance, to which the inspectors and the Disciplinary Committee alluded, his handling of the Lagos seminar showed a lack of conscientiousness and failure to come up to the ethical standards of public service. Moreover, since the meeting was attended by people from many African countries, his behaviour severely damaged the image of the Organization, which he was not just working for but representing.

21. The conclusion is that UNESCO was right to suspend him from duty as soon as it learned of his inadmissible behaviour over the Lagos seminar and to dismiss him after a disciplinary enquiry which was beyond reproach, despite the shortcomings of the Disciplinary Committee's report. The Appeals Board's conscientious handling of the case made good those shortcomings. As for the Board's recommendation, the final decision was up to the Director-General, who was free to endorse the view of the minority. The Tribunal is satisfied that his was the sounder view.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re ROSÉ

Judgment 1442

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain René Pierre Rosé against the European Patent Organisation (EPO) on 11 June 1994, the EPO's reply of 30 August, the complainant's rejoinder of 5 December 1994, the Organisation's surrejoinder of 10 January 1995, the complainant's further submissions of 28 March and the Organisation's final comments thereon of 26 April 1995;

Considering the application to intervene filed by Mr. Jean-Pierre Cervantes on 28 March 1995 and the EPO's comments thereon of 28 April 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By a communiqué, No. 219 of 22 July 1992, headed "Working Time Rules" the President of the European Patent Office, the secretariat of the EPO, announced his decision to increase the compulsory mid-day break for all staff from 30 to 45 minutes. By a note of 23 July the Director of Administration told EPO staff stationed at The Hague that for staff on a forty-hour week the time they were required to be present was still eight-and-a-half hours a day. By a note dated 28 August the Vice-President in charge of Directorate-General 1 (DG1) instructed staff at The Hague not to enter the additional 15 minutes of the mid-day break in time sheets.

By a letter of 17 December 1992 the complainant, who is employed in DG1, asked the President to confirm his own view that communiqué 219 meant a shortening of the working day to seven-and-three-quarter hours or, failing that, to treat his letter as an internal appeal. On 27 January 1993 his appeal went to the Appeals Committee.

In its report of 20 December 1993 the Appeals Committee declared his appeal receivable and recommended that the President confirm that his understanding of the communiqué was right. By a letter dated 22 February 1994, the impugned decision, the Director of Staff Policy told him that the President regretted the confusion the communiqué had caused, had never intended to reduce hours of work to "38 3/4 a week", and had decided to amend communiqué 219 and revert to the 30-minute mid-day break. Communiqué 256 of 15 December 1994 announced that decision to the staff; but it added that the extension of the break by 15 minutes was authorised "on condition that individual production is not affected".

B. The complainant submits that the longer break announced in communiqué 219 and the Director of Administration's note of 23 July 1992 shortened his working day by 15 minutes. It was the Administration's refusal to make things clear, in response to the case put by another official, that led him to appeal on 17 December 1992.

By declining to admit that the challenged measure amounted to a reduction of the working day the President had left everyone unsure where they stood. The Vice-President's instruction in the note of 28 August 1992 not to record the 15 additional minutes' break may be taken as an order to make false statements.

He says that the decision to shorten the working day, in the absence of a corresponding reduction in productivity targets, meant that those targets were raised by over 3 per cent, and productivity is a criterion of performance.

He asks the Tribunal to "confirm" that the 15-minute extension of the mid-day break meant a corresponding reduction in the working day and that the result was a shortening of the official working day to seven-and-three-quarter hours or of the week to thirty-eight-and-three-quarters and to declare the EPO liable for making his administrative situation vague and uncertain, requiring false statements in his time sheets and seeking to lower his output in breach of its duty of sound management. He claims 5,000 guilders in moral damages.

C. In its reply the EPO contends that the complaint is irreceivable because the complainant's internal appeal was time-barred. The reason why the letter of 22 February 1994 failed to raise the issue of receivability was that the measure he was objecting to was to be withdrawn anyway.

In subsidiary argument the Organisation takes up the complainant's pleas on the merits. The impugned decision was just a reform of the schedule of work and official acknowledgement of the staff's common practice of taking another 15 minutes in the middle of the day. Though the working day was that much shorter the week was still 40 hours. The 15 minutes were treated as working time and it was on the President's authority that they were not to be entered in the time sheets. The complainant did not raise the matter of productivity in his internal appeal. At all events communiqué 219 did not lower productivity targets since it did not alter working hours. Since the disputed measure has been withdrawn the complainant no longer has any cause of action.

D. In his rejoinder the complainant observes that the EPO has not amended communiqué 219 and that the disputed measure is still in force. He "believes" that his complaint is receivable: he lodged the internal appeal less than two weeks after the Administration's final reply to another staff member's challenge on the same issue. Besides, the President himself referred to the confusion which his decision to lengthen the break had caused and to the need to set things straight. He presses his arguments on the merits.

E. In its surrejoinder the EPO says that the President announced in communiqué 256 of 15 December 1994 his decision to amend communiqué 219 because he had to put an end to the "questions" it had raised, even though it had merely endorsed the conclusions of a working party which included staff representatives.

F. In further submissions the complainant denies that communiqué 219 endorsed the working party's conclusions. For one thing the working party did not propose extending the mid-day break. For another it did not put its findings to the President until 23 April 1993, several months after communiqué 219 had gone out. He observes that in its surrejoinder, contrary to earlier statements, the EPO acknowledges having taken until 15 December 1994 to withdraw the decision. It has not produced the working party's conclusions. The complainant asks the Tribunal to award him one guilder in token damages for the EPO's having given mistaken information and concealed evidence in the course of the proceedings and demands an apology from the Organisation or, failing that, an award of 10,000 guilders in damages.

G. In its final submissions the EPO maintains that it reversed the impugned decision on 22 February 1994 as it related to the complainant and that communiqué 256 of 15 December 1994 merely broadened the effect to the staff as a whole. It acknowledges that communiqué 219 did not "endorse" the working party's conclusions - except for leaving the working week as it was - and regrets using the word in its surrejoinder. The term should be "relied on".

CONSIDERATIONS:

1. The present dispute arises from changes the President of the European Patent Office made in the schedule of work for staff, among others, at its Directorate-General 1 (DG1) at The Hague. According to the rules of 5 November 1981 on working hours in DG1 "there shall be a lunch break between 11.30 and 14.00 of at least 30 minutes for staff members with a 40-hour working week and at least 45 minutes for all others". So as to improve working conditions, and after "a thorough discussion in the Presidential Committee" the President decided among other things, to lengthen the compulsory mid-day break from 30 to 45 minutes and to authorise another two 15-minute breaks each day. He announced his decision in communiqué 219 of 22 July 1992, which explained that the longer mid-day break should "go some way towards meeting the demand for a reduction in working hours" and would officially recognise "what is largely general practice within the Office". A note dated 23 July 1992 informed staff at The Hague that the time they were required to be present was still eight-and-a-half hours a day for those on a 40-hour week. In other words, the longer break did not require any longer presence on EPO premises.

2. The complainant and others, being unsure of the effect on hours of work, asked for further explanation. On 17 December 1992 the complainant asked the President to confirm that the working day had been reduced from eight to seven-and-three-quarter hours and the week from forty to thirty-eight-and-three-quarters. Failing such confirmation, he asked the President to treat his letter as an internal appeal to be put to the Appeals Committee.

3. The President referred his and 16 other like appeals to the Committee. In the internal proceedings the Administration said that the working week was still 40 hours and the 15 minutes added to the mid-day break did not count as working time. It also said, according to the Committee's own report, that the President realised that the EPO's Administrative Council would never agree to reduce total hours of work but he wanted to make the gesture of lengthening the mid-day break and allowing two other short breaks every day. But the Committee unanimously held that such reasoning was illogical: the

15 minutes tacked on to the mid-day break had to come from somewhere and must be either "subtracted from the working hours or ... added to the time staff are required to be present". Since the Administration had always made out that hours of work were unchanged the conclusion must be that the 15 minutes were to be charged to total working time and that the 17 appeals must succeed.

4. The President thereupon reviewed the matter and had the complainant informed by letter of 22 February 1994 that he regretted the confusion that communiqué 219 had caused, that he had never meant to shorten the week to thirty-eight-and-three-quarter hours and that he had therefore decided to amend the communiqué and go back to the compulsory mid-day break of 30 minutes. That is the decision under challenge. The complainant wants the Tribunal to "confirm" that the effect of the longer compulsory break was to reduce hours of work by 15 minutes a day; to "confirm" that the decision in communiqué 219 lowered hours of work to seven-and-three-quarters a day or thirty-eight-and-three-quarters a week; to declare the Administration liable for making his situation vague and uncertain; and to grant him 5,000 guilders in moral damages.

5. The EPO pleads that the complaint is irreceivable on the grounds that the complainant's internal appeal of 17 December 1992 came too late after the date of communiqué 219 and the decision of 28 August 1992 to apply it to staff at The Hague. But the objection cannot be sustained. What the complainant is impugning is not those general decisions but the application of them to himself which would be the consequence of the EPO's holding to its - in his view mistaken - interpretation of them. That the Administration had decided to change the rules did not bar him from challenging them at any time. He did so in his letter of 17 December 1992, which became a timely appeal to the Appeals Committee.

6. But does the complainant's claim to the quashing of the impugned decision disclose any cause of action, the President having told him of the amendment of communiqué 219 and the return to the compulsory 30-minute break? The evidence is that the latter "decision" did not come about until 15 December 1994. Communiqué 256 of that date said that the mid-day break was to last 30 minutes and another 15 were allowed "on condition that individual production [was] not affected". That may settle the matter for the future, though the complainant's final submissions suggest that it does not. But the issue raised in his internal appeal and in this complaint is unresolved. So he still has a cause of action.

7. The Appeals Committee's reasoning on the merits is sound. The EPO decided both to extend the mid-day break by 15 minutes, as communiqué 219 said, and to keep the number of

hours of presence unchanged, as for example the note of 23 July 1992 said. The necessary inference is that the working day was reduced by 15 minutes. So the complainant was right to appeal and is right in contending that, insofar as the President refused to state that the effect of communiqué 219 was to reduce hours of work, the impugned decision of 22 February 1994 cannot stand. But the decision must stand insofar as it refers to the amendment of communiqué 219 and to the return to the 30-minute break as from the date of communiqué 256.

8. The complainant's claims to damages for making his position vague and uncertain and for the consequent moral injury are disallowed. The Tribunal finds no evidence of any such injury.

9. Nor will it allow his claims in his final brief to damages and to an apology from the EPO for "mistaken information" in its submissions, "false witness" and any "concealment of evidence". The allegations are worthless.

10. The application by Mr. Cervantes to intervene succeeds insofar as his claims concur with the complainant's and he is in like case. But insofar as he objects to certain statements in the surrejoinder and seeks compensation for injury the Organisation's attitude caused him, he is raising issues of no relevance to this case and to that extent his application is irreceivable.

DECISION:

For the above reasons,

1. The President's decision of 22 February 1994 rejecting the complainant's internal appeal of 17 December 1992 is set aside to the extent stated in 7 above.
2. The complainant's other claims are dismissed.
3. The application to intervene is allowed to the extent stated in 10 above.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot Mella Carroll

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re VOLLERING (No. 6) Judgment 1443

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 25 May 1994, the EPO's reply of 29 August, the complainant's rejoinder of 6 December 1994 and the Organisation's surrejoinder of 12 January 1995;

Considering the application to intervene filed by Mr. Jean-Pierre Cervantes on 28 March 1995 and the EPO's comments thereon of 28 April 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By a communiqué, No. 219 of 22 July 1992, headed "Working Time Rules" the President of the European Patent Office, the secretariat of the EPO, announced his decision to increase the compulsory mid-day break for all staff from 30 to 45 minutes. By a note of 23 July the Director of Administration told EPO staff stationed at The Hague that staff on a forty-hour week were still required to be present eight-and-a-half hours a day. By a note dated 28 August the Vice-President in charge of Directorate-General 1 (DG1) instructed staff at The Hague not to enter the additional 15 minutes of the mid-day break in time sheets.

By a letter of 20 October 1992 the complainant, an official in DG1, told the President that he took communiqué 219 to mean that the time the staff had to be present on the premises was increased from eight-and-a-half hours a day to eight-and-three-quarters; he asked the President to review the decision of 22 July 1992 or, failing that, to treat his letter as an internal appeal. In a note of 5 November the Head of the Personnel Department replied that the Director of Administration's note of 23 July and the Vice-President's note of 28 August had already settled the matter; so there was no need to refer it to the Appeals Committee. In a letter of 24 November to the Head of Personnel the complainant expressed the view that since the Administration had made the mid-day break 15 minutes longer and staff still had to spend only eight-and-a-half hours at the office the working day had been cut to seven-and-three-quarter hours. He asked for confirmation of that view. In a note of 2 December the Head of Personnel informed him that the Vice-President's note of 28 August 1992 called for no further comment and that he was passing on the appeal to the Directorate of Staff Policy for action.

In its report of 20 December 1993 the Appeals Committee unanimously recommended rejection. By a letter of 22 February 1994, the impugned decision, the Director of Staff Policy told the complainant that the President had decided to reject his appeal.

In communiqué 256 of 15 December 1994 the President informed the staff that he had decided to revise communiqué 219 and go back to a 30-minute mid-day break.

Communiqué 256 added that the extension of the break by 15 minutes was authorised "on condition that individual production is not affected".

B. The complainant submits that the President wilfully omitted to consult the General and Local Advisory Committees before taking the impugned decision. That was contrary to Articles 38(3), 38(4) and 55(3) of the Service Regulations. Such breach of good faith and such misuse of authority by the EPO entitle the complainant to damages for moral injury.

He says he got no reply to his request of 24 November 1992. The Organisation left him unsure of his position and refused to explain properly the effects of the challenged decision. It thereby impaired his right to a hearing, failed to comply with its duty to inform the staff and acted in breach of due process.

He objects to the consequences of reducing hours of work from eight to seven-and-three-quarters a day. He reckons that the EPO imposed a 3.2 per cent rise in productivity inasmuch as targets remained the same despite the reduction in working time. Since he needs as much time as before to reach his target, he now has to spend forty-three-and-three-quarter hours a week at the office. What is more, the decision to lengthen the mid-day break and the Vice-President's instructions of

28 August 1992 not to enter the 15 additional minutes in time sheets forced him to make misrepresentations. The Director of Administration's note of 23 July 1992 requiring him to spend eight-and-a-half hours a day at the office unduly restricted his freedom to go elsewhere during the break.

He objects to the recommendation of the Appeals Committee, whose reasoning, he submits, is mistaken and incomplete.

He seeks the quashing of the President's decision to extend the mid-day break by 15 minutes and wants the Tribunal to declare the EPO liable for (1) upsetting the "legal stability" of his position by its breach of Articles 38 "and/or" 55(3) of the Service Regulations; (2) the breach of good faith and misuse of authority in its failure to comply with Articles 38 "and/or" 55(3); (3) the breach of good faith and of due process in its refusal to give him clear information on his working conditions; (4) the breach of his right to a hearing in its implied refusal to discuss the consequences of the challenged decision; (5) the confusion caused by the measure and the order not to record the break; and (6) flaws in the internal appeals procedure. He seeks 35,000 guilders in moral damages and additional annual leave by way of compensation for time lost on account of the longer break. He wants the Tribunal to cancel his obligation to be present eight-and-a-half hours a day at the office and to award him 10,000 guilders in material and moral damages for the restriction on his freedom. He claims 10,000 guilders in costs.

C. In its reply the EPO submits that the complaint is plainly irreceivable "for lack of purpose" and in any event devoid of merit. Besides his claims are receivable only insofar as he has exhausted the available means of resisting the challenged measure. The Organisation invites the Tribunal to declare the complaint an abuse of the right to appeal.

Its pleas on the merits are subsidiary. It submits that there was no reason to consult the General or Local Advisory Committees on what was a mere rescheduling of hours of work in recognition of common practice.

It did not deny the complainant information on the effects of the measure. The Head of the Personnel Department himself twice explained things to him and told him that communiqué 219 did not change the amount of time he was to spend at the office. Besides, he had the opportunity to make his case in the internal appeal proceedings.

The working day is still eight hours. The EPO may set the same standards of productivity as before, even though the complainant's claims are on that score irreceivable. He may forgo one of the two daily 15-minute breaks if he thinks he must in order to keep up his output.

There is plainly no need to enter the 15 additional minutes in time sheets since on the President's authority they count as working time. As for being "present" at the Office, the complainant seems to have misunderstood the communiqué: there was never any question of restricting his freedom of movement during the mid-day break.

The EPO is not liable for the views of the Appeals Committee, which is an autonomous body.

D. In his rejoinder the complainant enlarges on his pleas. He alleges that the practice of a 45-minute break, however common, cannot lay any obligation on the staff as a whole. The President is responsible for ensuring that the Appeals Committee conducts its business properly.

He wants the Tribunal to order the EPO to pay him a further 5,000 guilders in damages for discriminatory treatment since he has to go on working during the 15-minute breaks in order to make up for the extended mid-day break and his bigger workload. He cannot exercise his right to a 45-minute break, unlike others who were already taking such a break and who fare better for the change.

E. In its surrejoinder the EPO presses its pleas. On receivability it points out that the complainant said nothing in his internal appeal of the connection between the longer break and productivity. The new claim in his rejoinder is irreceivable and unsound. The President announced in communiqué 256 of 15 December 1994 his decision to amend communiqué 219 because he had to put an end to the "questions" it had raised, even though it had merely endorsed the conclusions of a working party which included staff representatives.

CONSIDERATIONS:

1. Like another dispute on which the Tribunal rules this day (Judgment 1442, in re Rosé) this dispute arises from changes the President of the European Patent Office made in the schedule of work for, among others, staff at its Directorate-General 1 (DG1) at The Hague. According to the rules of 5 November 1981 on working hours in DG1 "there shall be a lunch break between 11.30 and 14.00 of at least 30 minutes for staff

members with a forty-hour working week and at least 45 minutes for all others". So as to improve working conditions, and after "a thorough discussion in the Presidential Committee", the President decided, among other things, to lengthen the compulsory mid-day break from 30 to 45 minutes and to authorise another two 15-minute breaks each day. He announced his decision in communiqué 219 of 22 July 1992, which explained that the longer mid-day break should "go some way towards meeting the demand for a reduction in working hours" and would officially recognise "what is largely general practice within the Office". A note dated 23 July 1992 informed staff at The Hague that the time they were required to be present was still eight-and-a-half hours a day for those on a forty-hour week. In other words, the longer break did not require any longer presence on EPO premises.

2. The complainant, an employee who was affected by the changes, wrote to the President on 20 October 1992 to say that for him communiqué 219 meant "an extension of my daily presence in the Office from 8 1/2 hours to 8 3/4 hours". He accordingly asked the President to withdraw his decision or else treat his request as an internal appeal. In a reply dated 5 November the Head of the Personnel Department said that the note of 23 July made it plain that his presence at the office was still required for eight-and-a-half hours a day, that the Administration had met his request and that the matter need not go to the Appeals Committee unless he pressed it. In a letter of 24 November 1992 he sought further explanations and clarification. He got a summary reply dated 2 December from the Head of Personnel, who just passed his internal appeal of 20 October on to the Directorate for Staff Policy. The Directorate put it to the Appeals Committee on 8 December 1992. The Committee unanimously recommended rejecting his claims and the President did so by a decision of 22 February 1994, which he is impugning.

3. Some of the complainant's great many procedural and substantive objections to communiqué 219 concur with claims and pleas from other staff whose appeals also went to the Appeals Committee. As the EPO observes, the material issues of this complaint are determined by the thrust of the decision he was challenging in his internal appeal. What he was challenging at the outset was the lawfulness of communiqué 219 on the grounds that it increased the amount of time he had to spend at the office every day. The Tribunal is satisfied on the evidence, and holds in Judgment 1442, that the amount of time to be spent at the office was always eight-and-a-half hours a day and that the decisions taken in July 1992 did not alter that. Indeed that is just what the EPO said in its note of 23 July 1992, which the complainant thought irrelevant.

4. So his internal appeal of 20 October 1992 disclosed no cause of action, and neither did his objections to the

decision which the Head of Personnel took on 5 November 1992 by reference to the note of 23 July 1992. Since the complainant may not put wider claims to the Tribunal than in the internal appeal, and since the impugned decision of 22 February 1994 merely rejected his appeal of 20 October 1992, he has no cause of action. His complaint is therefore irreceivable.

5. He accordingly fails in his claims, set out above under B and D, to damages under several heads, including the claims that he rests on flaws he mistakenly alleges in the appeal proceedings.

6. The Organisation asks the Tribunal to declare his complaint to be an obvious abuse of the right to appeal, though it does not make any formal counterclaim. The EPO is mistaken. All that the complainant did was exercise his right to appeal; communiqué 219 was, as Judgment 1442 observes, so vague as to prompt many internal appeals, and, however they fared, they were quite understandable.

7. The application to intervene, though receivable, must also fail.

DECISION:

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot Mella Carroll

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-NINTH SESSION

In re MOOSAI Judgment 1444

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Robin Moosai against the Pan American Health Organization (PAHO) on 18 May 1994, the PAHO's reply of 17 November 1994, the complainant's rejoinder of 21 January 1995 and the Organization's surrejoinder of 6 March 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Canadian who was born in 1947, is a virologist. He used to be employed in Toronto as a research scientist for the Ministry of Health of Ontario. The PAHO has a Caribbean Epidemiology Centre, known as CAREC, at Port-of Spain in Trinidad. In April 1991 the Director of CAREC offered him a short-term appointment as a consultant virologist with the Centre. Having accepted the offer, he took up that appointment on 1 September 1991 under a contract that ran to 31 July 1992. His performance in that period was evaluated in a report dated 12 February 1993.

The PAHO issued a notice of vacancy on 25 October 1991 offering a post, graded P.4 and numbered 5302, for a virologist at the Centre. The complainant was one of several applicants. In a telex of 1 July 1992 to the Director of CAREC a personnel officer at the PAHO's headquarters in Washington D.C. said that the complainant had been selected. PAHO granted him a fixed-term appointment for two years from 1 August 1992. In the first year he was to be on probation in accordance with Rule 420.4 of the PAHO Staff Rules, which reads:

> "Any appointment of one year or more shall be subject to a period of probation, which shall be at least one year and may be extended up to two years when necessary for adequate evaluation of the staff member's performance, conduct and suitability to international service."

The first report appraising the complainant's performance on probation was dated 11 June 1993 and covered the period since 1 August 1992. His first-level supervisor described his performance as "satisfactory" according to ten "evaluation factors" and as needing "improvement" according to two others, assessed his management skills as "less than satisfactory" and said he was "not fully convinced about the quality of Dr. Moosai's contributions and performance". He recommended extending probation by six months. The second-level supervisor, who was the Director of the Centre, commented on 16 June 1993 that the complainant had "fallen short of expectations at both technical and managerial levels". The upshot was that on 24 June he had his probation extended by six months.

His first-level supervisor made a second probation report on 30 November 1993 and it was about his performance since 1 August 1993. The ratings ranged from "outstanding" on one aspect of performance (headed "Provides timely/correct information to subordinates and supervisor") to "unsatisfactory" on another (headed "Resolves conflicts effectively"). His second-level supervisor concluded that because of "major continuing deficiencies" it was not in the Organization's interest to keep him on.

By a letter of 19 January 1994 the Chief of Personnel gave him one month's notice of termination under Staff Rule 1060, which is about non-confirmation of appointment on the grounds of unsatisfactory performance or unsuitability for international service.

In a letter of 9 February he appealed to the Director of the PAHO under Rule 1210.1 seeking another extension of probation.

By a letter dated 15 February 1994 the Director confirmed the earlier decision but extended the period of notice to 18 March 1994. That is the decision impugned.

B. The complainant submits that the termination of his appointment is unlawful. He has three main pleas.

He first alleges flaws in the process of appraisal. His first-level supervisor did not even realise until March 1993 that he was supposed to be supervising him. So how could he have given him regular guidance on performance? Not until the Administration made the second probation report did it bring "major deficiencies" to his attention. So it was in breach of Rule 530.1.4, which required his supervisor to hold frequent discussions about his work with him. For want of proper guidance his performance appraisals are invalid.

His second plea is breach of due process. The Chief of Personnel told him that the decision of 19 January rested not only on the two probation reports but also on "further assessment" of his performance. The PAHO's failure to show him the text of that assessment and to invite comment from him is a fatal flaw.

Lastly, he contends that there was "no reasonable basis" for termination. His technical ability is sound and he is "enthusiastic" about new techniques. Though he discharged a workload which was increased because of understaffing he fell foul of a supervisor who failed to understand his own part in the process of appraisal.

He claims reinstatement as from 18 March 1994, moral damages and costs.

C. In its reply PAHO contends that its decision not to confirm the complainant's appointment was lawful. His performance during probation was unsatisfactory and his appraisal reports identified the areas that needed improvement and gave him express warnings. Throughout his tenure in the PAHO he had the same first-level supervisor, the Head of the Laboratory Division of CAREC, who was "totally aware" of his duties as supervisor. The complainant's failure to get on well with other staff made him unsuited to international service. That too afforded grounds for termination of his appointment under 1060.

In any event the case law makes it plain that the Director enjoys the broadest discretion in confirming a probationer's appointment. The complainant has not proved any flaw fatal to the Director's decision.

D. In his rejoinder the complainant disputes some allegations of fact and the arguments in the reply and enlarges on his own pleas. By making out that he is unsuited to international service the Organization has shifted ground. The Chief of Personnel "had no authority" to rely on "anything but the initial and extended probationary appraisal reports". So the impugned decision was "taken without authority" and in breach of the rules and rested on a "clearly mistaken" conclusion.

E. In its surrejoinder the PAHO maintains that the decision was a proper exercise of discretion. All the complainant offers in support of his case is hearsay evidence and documents that do not form part of the "official record". The "general" language that the Director used to explain his decision covered the ability to maintain satisfactory working relations as well as other aspects of performance and suitability for service. The complainant has failed to show any flaw so "glaring" as to warrant quashing that decision.

CONSIDERATIONS:

1. The complainant took up duty with the Organization at its Caribbean Epidemiology Centre (CAREC) on 1 September 1991 as a short-term consultant virologist on an eleven-month appointment. The appointment was granted solely on the strength of his credentials pending the outcome of the formal process to fill a vacancy for a virologist at grade P.4. The complainant applied and was appointed to the post as a staff member as from 1 August 1992. He had a contract for two years, in the first of which he was on probation. The period of probation was extended on 24 June 1993, by six months, to 31 January 1994. By a letter of 19 January 1994 the Chief of Personnel gave him notice in accordance with Staff Rule 1060 that his appointment was to end at 28 February 1994. He appealed under Rule 1210.1 in a letter of 9 February to the Director of the PAHO. In his reply of 15 February the Director upheld the decision to terminate his appointment, though the date of termination was postponed to 18 March 1994. That is the decision he is impugning.

2. Rule 1060 provides:

> "If, during an initial or extended probationary period, a staff member's performance or conduct is not satisfactory, or if he is found unsuited to international service, the appointment shall not be confirmed but terminated. The staff member shall be given one month's notice. No indemnity is payable."

Rule 1070.1 reads:

> "A staff member's appointment may be terminated if his performance is unsatisfactory or if he proves unsuited to his work or to international service. It shall be considered unsatisfactory performance if the staff member does not or cannot perform the functions of the post to which he is assigned, and unsuitability for international service if he fails to establish satisfactory working relationships with other staff members or with nationals of other nations with whom he is working."

Lastly, Manual paragraph II.9.410 says that the final decision on termination of a probationary appointment "is taken on the basis of the performance appraisal report and on the staff member's comments on the report".

3. In the course of his two-and-a-half years' stint with CAREC the complainant had his performance evaluated three times: first, as a short-term consultant; secondly, for the original period of probation; and thirdly, for the six months' extension of probation.

4. The first, an "evaluation report" dated 12 February 1993, was about his work as a short-term consultant from September 1991 to July 1992. It was written by the Director of CAREC "in consultation with" his first-level supervisor, the Head of the Centre's Laboratory Division. Though partly favourable, their report spoke of "weaknesses" which they described as follows: "some difficulty translating emphasis on quality control into action"; "difficulty in translating results into appropriate strategies"; and "over-emphasis on high technology as the answer to epidemiological diagnostic policies". A note in the report said that he had submitted "late, after second request" his own report on his activities.

5. Secondly, a probation report was written in June 1993. It appraised his performance in the period since August 1992. His first-level supervisor, the Head of the Laboratory Division, commented that he "did not understand fully the dimension of role and responsibilities of virologist position". In answer to a question in the report form about the quality of his contribution to the objectives of the Organization the same supervisor said:

> "I am not fully convinced about the quality of Dr. Moosai's contributions and performance in relation to the requirements of post and organizational objects and stability of virological services".

He described the complainant's "management capabilities" during the period of review as "less than satisfactory" and accused him of failing to "appreciate full dimension of managerial/supervisory responsibility attached to his position". He based his assessment on his own findings and on "the feedback received from within and out of CAREC". The Director of the Centre, too, expressed dissatisfaction: he commented that the complainant had "fallen short of expectations at both technical and managerial levels"; "His approaches to problem solving are too often theoretical/impractical"; "Increasing concerns have been expressed by clients (internal and external) about apparent deterioration of virology services (e.g. timeliness of reports) and whether he appreciates the clinical relevance"; since "he has not fully understood the significance of these concerns for the continuation of his post", he is to be "granted an additional 6 months' probation". "However" - the Director concluded - "if there is no major improvement, it will not be possible to confirm him at the end of this period".

6. Thirdly, a second probation report, written in November 1993, was about his performance since 1 August 1993. In answer to the question about his contribution to the Organization's objectives the Head of the Laboratory Division spoke of the need for him "to provide leadership" and to communicate effectively with subordinates. He had, said his supervisor, "not yet regained the trust and confidence of his subordinates based on the feedback received from the staff". There had been many incidents of conflict between him and other staff. In general he had "not shown considerable improvement" since the last appraisal. His "role as a CAREC clinical virologist in support of the [Expanded Program on Immunization]" was "not satisfactory". By way of conclusion the Director wrote:

> "... it is quite clear now that [his] continued service in this post is not in the interest of PAHO/CAREC due to major continuing deficiencies".

7. The Organization terminated the complainant's appointment on the strength of the evaluations in those three reports and in accordance with Rule 1060. It submits that not only were his performance and conduct unsatisfactory but he was unsuited to international service in that he failed to establish satisfactory working relations with other staff. It says that "problems with his managerial and supervisory skills" were borne out by many reports on the performance of staff working directly under him.

8. Termination of an appointment is a discretionary decision which the Tribunal will set aside only on limited grounds: if there was a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority. Furthermore, as the Tribunal said in Judgment 1161 (in re Bouritsas) about the case of someone who, like the present complainant, had been on probation:

> "The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the Organisation. The competent authority will determine on the evidence before it and possibly after extension of the probation ... where doubt still lingers, whether to dismiss the official or to confirm the

> appointment. It must indeed be allowed the widest measure of discretion in determining whether someone it has recruited shows the highest level of qualifications required for a post in the particular field in which he is to be working."

9. The complainant contends that the Head of the Laboratory Division was not aware of his responsibilities as first-level supervisor. The plea fails. The Head of the Division was the complainant's first-level supervisor throughout the material period. He was consulted in that capacity by the Director of the Centre before the writing of the first probation report. And he had several meetings to discuss performance with the complainant, including talks that lasted some eight hours and were spread over three days. So the complainant's contention is simply not credible.

10. The complainant further contests the termination of his probationary appointment on the grounds that his first-level supervisor failed to give him the "guidance and feedback" he was entitled to under Rule 530. The rule provides:

> "530.1 Supervisors shall be responsible for facilitating the adjustment of a staff member to his work by:
>
> 530.1.1 providing him with a clear statement of his duties and his official relationships;
>
> 530.1.2 instructing and guiding him in performing his functions;
>
> 530.1.3 introducing him properly to those staff members with whom he will be required to work;
>
> 530.1.4 discussing his work with him at frequent intervals."

The argument again fails. The Tribunal is satisfied on the evidence that several meetings were held and memoranda exchanged between the complainant and both his supervisors about his performance and that such discussions and correspondence, together with the three evaluation reports, provided him with the guidance that Rule 530 required.

11. The complainant submits that "there was no reasonable basis" for the Head of Division's conclusions and so for the termination of his appointment. He observes that the

appraisals show "inconsistencies" and "disagreement" between his two supervisors. Be that as it may, supervisors do not have to have identical opinions: indeed it is a safeguard for any staff member to be evaluated by more than one supervisor and to have them bring possibly different views to bear. Moreover, the complainant has failed to prove any mistake of fact or any wrong conclusion about the assessments of his performance.

12. The complainant implies that it was not any shortcomings of his own but the Centre's financial situation that really prompted the decision not to confirm his appointment. But he offers no evidence to support that view. Indeed shortly after his departure, by a vacancy notice dated 22 August 1994, the PAHO offered for competition the post he had held and at the time of its reply to the complaint - November 1994 - it was holding interviews with candidates.

13. The complainant pleads that his supervisors failed to follow correct procedures on the grounds that the "evaluation report" - the first of the three - purported to cover the period from July 1991 to August 1992, whereas the period really ran from 1 September 1991 to 31 July 1992. That is immaterial. The two probation reports were correctly stated to cover the periods from 1 August 1992 and then from 1 August 1993 to 1 February 1994. The mistake in the evaluation report about the date at which the complainant took up duty with the Organization does not invalidate the comments about his performance. He says that the Director of the Centre started to write a probation report in May 1993 and then discarded it. But the point is irrelevant since the first probation report was later completed by both the Head of the Laboratory Division and the Director.

14. The complainant cites the letter that the Chief of Personnel wrote him on 19 January 1994 terminating his employment and explaining that the decision was based on his "initial and extended probationary appraisal reports as well as a further assessment of [his] work performance". He submits that that offended against natural justice since he was given no opportunity of seeing the "further assessment", let alone commenting on it. But the decision he is impugning is contained in the letter of 15 February 1994, in which the Director of PAHO stated:

> "I have personally examined your case, which included a review of your initial and extended probationary appraisal reports, and have concluded that the impugned decision has been taken for reasons connected with your performance.

> I have also found that you have been given ample opportunity to reply to the appraisals of your work performance made by your first- and second-level supervisors, and that your initial probationary period of one year was extended for six months in order to accord you the opportunity to correct deficiencies in performance, as noted by your supervisors."

That text shows that the final decision was taken in accordance with the requirements of Manual paragraph II.9.410.

15. Lastly, the complainant pleads that the Organization shifted ground by contending that he was unsuited to international service. But that was not the reason that the Director gave for the termination of his appointment: the Director relied, as the above-mentioned Manual paragraph required, on the probation reports.

16. In sum the Tribunal is satisfied that the two probation reports afforded ample grounds for terminating the complainant's appointment and that he has failed to show any flaw in the Director's decision that would warrant setting it aside.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Michel Gentot
Michel Gentot

Mella Carroll
Mella Carroll

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner
A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re KIGARABA (No. 6)

Judgment 1445

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Richard Kigaraba against the Universal Postal Union (UPU) on 15 August 1994, the UPU's reply of 18 October, the complainant's rejoinder of 22 December 1994 and the Union's surrejoinder of 6 February 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the UPU and facts material to this case are summed up under A in Judgments 1188 of 15 July 1992 and 1310 of 31 January 1994.

As was said in those judgments, the Union accused the complainant of making a false statement on 16 May 1990 to obtain repayment of the cost of school textbooks for his children, who were at the International School in Berne. On two UPU forms, one for his daughter and one for his son, headed "Certificate of school attendance and of costs for education grant" he wrote that the textbooks "were not given free of charge". Correspondence between the Head of Personnel and the headmaster revealed that the school had lent the books to the children. At the Director-General's bidding the complainant sent a letter of explanation on 8 June 1990.

In a minute of 20 June to the head of the complainant's unit, Division I, the Director-General rejected the complainant's claims to repayment and referred the matter to the Disciplinary Committee under Regulation 10.2.4 of the Staff Regulations of the International Bureau of the UPU. By a letter of 28 June the complainant asked the Director-General to reconsider his decision but in a minute of 3 July to the Head of Division I the Director-General upheld it. In its report of 26 July the Disciplinary Committee unanimously recommended giving the complainant a written warning under Regulation 10.2.1a. On 13 November, however, the Director-General told the complainant that his next salary step was postponed for one year, a penalty provided for in Regulation 10.2.1b.

On 21 December the complainant lodged an appeal. In its report of 28 March 1991 to the Director-General the Joint Appeals Committee endorsed the Disciplinary Committee's recommendation of 26 July 1990. He impugned in his first complaint the decision that the Director-General accordingly took on 19 April 1991 to hold up his step advancement.

In Judgment 1188 of 15 July 1992 the Tribunal issued an interlocutory order to the UPU to produce the reports of the Joint Appeals Committee and the Disciplinary Committee. In Judgment 1228 of 10 February 1993 the Tribunal sent the case back, without ruling on the merits, for a new decision by the Union on the grounds that the appeal procedure had been flawed.

The complainant refused to lodge a new appeal as the Director-General suggested. On 3 August he filed his second complaint, an application for the execution of Judgment 1228, on the grounds that the Union was to take a new decision. He also claimed the cost of his children's school textbooks. In Judgment 1310 of 31 January 1994 the Tribunal dismissed the application as premature on the grounds that the case was pending before the Joint Appeals Committee. It dismissed his claim to the cost of the textbooks on the grounds that he had failed to exhaust the internal means of redress.

In its second report, dated 24 May 1994, the Joint Appeals Committee recommended by a majority that the Director-General still take disciplinary action against the complainant but consider making it less severe. By a letter of 6 June 1994, the decision impugned in this complaint, the Director-General told the complainant that he upheld his decision of 13 November 1990 to hold up his step increment by one year.

B. Citing Judgment 1310, and in particular what the Tribunal said under 9, the complainant submits that it did not at the time have before it all the required evidence to entertain his claim to the cost of the textbooks. It is plain from his internal appeal of 21 December 1990 that he did make the claim. The reason why he awaited the outcome of the disciplinary proceedings before going to the Joint Appeals Committee was that his claim to lump-sum repayment and the matter of the disciplinary sanction had to be taken together.

He presses some of the pleas he put forward in support of his first complaint. He points out again that the books were not given but lent by the International School at Berne and he spent money to replace several that were damaged or lost and to buy others. The decision of 6 June 1994 shows prejudice: there is no accounting otherwise for the Director-General's determination to punish him for claiming a sum so much smaller than the amount of the education grant he was entitled to.

He pleads breach of equal treatment. Whereas the Union settled amicably claims by all other staff that were inconsistent with the rules, his was the only case to prompt correspondence with the school and then disciplinary proceedings. Though the Union was right to be less easy-going in handling the matter it was not right to discriminate against anyone in changing its approach.

The Director-General overlooked relevant facts. In his minute of 20 June 1990 he discounted the arguments in the complainant's letter of 8 June 1990 explaining his claim. The Director-General made a mistake of fact in failing to distinguish between "giving" and "lending" school books. That is why he wrongly described as false the complainant's statement that the books "were not given free of charge". And the Director-General's letter of 6 June 1994 says nothing of the "mitigating circumstances" found by the Disciplinary Committee and the Joint Appeals Committee.

The complainant wants the Tribunal to review what it said in Judgment 1310 under 9. He asks it (1) to quash the Director-General's decision of 6 June 1994, (2) to order the Union to pay him the salary and allowances that would have been due to him had he got his step increment on 1 December 1990, plus interest at the rate of 10 per cent a year, (3) to order the Union to pay him 450 United States dollars, plus interest at the rate of 10 per cent a year, as repayment of the cost of the textbooks and (4) to award him moral damages and costs.

C. In its reply the Union contends that the complainant's application for review of what the Tribunal said in Judgment 1310 under 9 is irreceivable. He offers no valid reason for such review. He admits that he was late in going to the Joint Appeals Committee and his explanation is unconvincing. In any event he is not entitled to the cost of the books. It is covered by school fees and his children got the books free of charge anyway. He has consistently refused to produce evidence to show that he bought books save to replace lost ones.

Under Staff Regulation 10.2 there is only one form of disciplinary action that is lighter than postponing a step increase. That penalty is proportionate to the complainant's offence. What he did was the more serious because it was he who was processing officials' claims to school expenses. He knew that if he said on the two certificates of school attendance that textbooks were not supplied free of charge he could get the lump-sum repayment without offering any evidence in support.

He was not discriminated against. He may not plead an "easy-going" policy on education expenses. Even if there had been such a policy it would have been of his own making. Besides, the Union is not aware that any other officials have committed improprieties like those he is guilty of.

D. In his rejoinder the complainant submits that the internal means of redress need not have been exhausted for an application for review to be receivable.

He was not to blame for the policy on education expenses: his job was to apply it, not to think it out. The Disciplinary Committee and the Joint Appeals Committee acknowledged that it was "easy-going" and thought that a "mitigating circumstance".

He has not kept the receipts for the books he bought. He saw no point in that since he was claiming refund of the lump sum.

E. In its surrejoinder the Union repeats that the International School supplies all school books free of charge and that the complainant had no reason to buy any. Even if he had bought school books - and he offers no evidence of having done so - he would not have been entitled to lump-sum repayment since they are covered by school fees.

It is not true that the policy was "easy-going": the cost of books is met only if the school certifies that they are not supplied free of charge. What the Disciplinary Committee and the Joint Appeals Committee were referring to was the Union's approach to another head of education expenses.

CONSIDERATIONS:

1. This complaint is about disciplinary action taken against the complainant for making a false statement. He made the statement in support of his claim to payment of a lump sum to cover the cost of textbooks in accordance with administrative circular No. 14 of 22 October 1987. Facts relevant to the dispute appeared in Judgments 1188 and 1310.

2. Judgment 1228 quashed the Director-General's decision of 19 April 1991 for breach of the complainant's right of defence. Instead of awaiting the outcome of the internal appeal proceedings, which had resumed with a newly formed Joint Appeals Committee, the complainant filed another complaint directly with the Tribunal. But Judgment 1310 dismissed it as premature, ruling under 9 that his claim to the repayment of the cost of the school books was irreceivable because he had failed to exhaust the internal means of redress.

3. The complainant is seeking review of that ruling. According to consistent case law the Tribunal's judgments carry the authority of res judicata and may be reviewed only in exceptional cases. As was held in Judgment 1353 (in re Louis No. 4) -

> "Several pleas afford inadmissible grounds for review, such as allegations of errors of law or misappraisal of evidence; other pleas may be admissible provided they may have an effect on the Tribunal's decision, examples being failure to take account of some specific fact and a material error, i.e. a mistaken finding of fact that involves no value judgment and is therefore distinguishable from misappraisal of evidence."

The complainant argues that the parties adduced "little evidence" on the issue and that the Tribunal, which "merely touched" on the merits, failed to take account of a specific fact. But it is plain on the evidence - and the complainant has himself conceded - that his claim to the lump-sum benefit, which he lodged with the Joint Appeals Committee on 21 December 1990, over five months after the Director-General's final decision of 3 July 1990, was time-barred, and the explanations he gives for the delay are not convincing. Since he has offered no valid grounds for taking a different view of the matter, his application for review of the earlier ruling must fail.

4. The Appeals Committee submitted on 24 May 1994 a second report recommending that the Director-General should uphold his decision to take disciplinary action but consider imposing a lighter penalty. The Committee held that the complainant's other claims, including repayment of the costs of

the textbooks, showed no cause of action. By a decision of 6 June 1994 the Director-General confirmed the postponement of his step increment by one year. That is the decision under challenge.

5. The complainant's pleas come under four heads: breach of equal treatment, neglect of material facts, breach of the rule of proportionality, and prejudice.

6. First, he pleads breach of equal treatment. He relies on a statement by the Disciplinary Committee, which the Joint Appeals Committee cited in its report of 28 March 1991, that the Bureau's practice of refunding school expenses was fairly "easy-going". He says that he was denied the benefit of such practice.

7. Consistent precedent has it that there cannot be breach of equal treatment unless there is different treatment of officials who are in like position in fact and in law. There is no evidence to show just what the practice that the complainant relies on may have been: it does not seem to be a general one. Nor is there any evidence to suggest that those who he says benefited from it were all in the same position in fact and law as he. Indeed the Disciplinary Committee's report shows that his position in fact was peculiar to him since it was he who processed claims to the refund of education expenses. So he may not claim the same treatment as other officials and his plea must fail.

8. Secondly, he contends that the Union overlooked material facts: the Director-General failed to consider the arguments he appended to his claim of 8 June 1990; committed mistakes of fact by overlooking the difference between "lending" school books and "giving" them out and by wrongly charging him with wilful misconduct; showed bias by overlooking mitigating circumstances; and broke the rule that the punishment must be proportionate to the offence.

9. None of the objections can be sustained. The absence of a reply to the letter of 8 June 1990 is relevant only to the decision of 20 June 1990, not to the one of 6 June 1994 that has prompted this complaint. So the plea fails on the facts.

10. It is mistaken to say that the Director-General failed to distinguish between "lending" and "giving" school books. The Disciplinary Committee made that distinction in its comment that the complainant himself had written on the school certificates of 16 May 1990 that books "were not given free of charge" and that "his statement proved false, since the school said it lent all the prescribed books free of charge to pupils, including Mr. Kigaraba's children". The Joint Appeals Committee rejected the complainant's allegations on that score in

1991 and again in 1994. The Director-General accepted the conclusion of the Disciplinary Committee and that of the Appeals Committee in its second report that the complainant's false statement amounted to misconduct. He thereby correctly construed and approved the grounds in fact and law for the recommendations by the two bodies. So there was no mistake of fact.

11. The complainant's third plea is that the punishment was too harsh. In his submission the Director-General ignored the mitigating circumstances and the slightness of his offence. The Disciplinary Committee had pointed out in his favour that the Union had been rather easy-going about meeting school costs and that this was his first attempt to claim a lump sum. Although in 1991 the Appeals Committee shared that view, in 1994 it was more cautious on the grounds that not it but the Disciplinary Committee was competent to say what sort of disciplinary action was fitting. At all events the choice was obviously at the Director-General's discretion and the Tribunal will not interfere unless his decision shows some fatal flaw such as the one the complainant is alleging, breach of the rule of proportionality. In this case there was only one lighter form of punishment that the Staff Regulations allowed. Moreover, the Director-General thought his offence the more serious for his being the official in charge of processing claims to education expenses. The conclusion is that the penalty was not in the circumstances obviously disproportionate. His plea fails.

12. Lastly, his plea of prejudice fails for want of proof. He admits to having no direct evidence but sees bias as the only way of accounting for his other grievances and for the Director-General's rare determination to punish him for claiming 450 United States dollars. So proving prejudice depends on the success of his other pleas. Since for the reasons given above none of those other pleas is sustainable, this plea too must fail.

13. Since his complaint is devoid of merit he fails in his claim - which is, besides, irreceivable - to payment of the cost of the school books. Since his main claim fails so must the others.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot E. Razafindralambo

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re AGONCILLO, COLATOSTI, GILLAND, JACOBSEN, PALLUEL and PAPPALARDO

Judgment 1446

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed against the World Health Organization (WHO) on 14 July 1994 by Mrs. Rebecca Caseñas Agoncillo, Mrs. Loreta Colatosti, Mrs. Dominique Henriette Gilland, Mr. Henrik Skougaard Jacobsen, Mrs. Martine Alice Daniele Palluel and Mrs. Judith Mary Pappalardo, the WHO's reply of 10 October, the complainants' rejoinder of 21 November 1994, the WHO's surrejoinder of 20 February 1995, the complainants' further brief of 10 March and the Organization's comments thereon of 13 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the case is about the lawfulness of changes in the system of pay of WHO staff that consisted in the removal from salary scales of several additional step increments that used to be granted for merit or for long service, and that the parties' claims are as follows:

The complainants:

1. To quash the decisions applying the amendments of Staff Rules 550.1, 555.1 and 555.2, as notified by memorandum EPA/13/2/18 of 15 February 1994;
2. to order the Organization to pay them 6,000 Swiss francs in costs.

The defendant:

To dismiss the complaint.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. By memorandum EPA/13/2/18 of 15 February 1994 the Director of the Personnel Division informed WHO staff of the Director-General's decision to amend Staff Rules 550.1, 555.1 and 555.2 as from 1 February 1994. Those rules provide for the grant in certain circumstances of additional salary increases on grounds of merit and long service. The amendments were made on the recommendation of the United Nations General Assembly and the International Civil Service Commission (ICSC). Their main purpose was to do away with increases for long service for staff recruited as from 1 March 1993 and to limit increases for merit to the maximum figures of pay allowed in each grade. Many of the staff objected, including four of the complainants, and on 15 April 1994 they lodged appeals. On the grounds that the dispute was confined to an issue of law the Director-General gave the complainants leave to go straight to the Tribunal. He so informed them in letters of 27 April, which are the decisions impugned by Mrs. Agoncillo, Mrs. Gilland, Mrs. Palluel and Mrs. Pappalardo, and in letters of 26 May, the decisions that Mrs. Colatosti and Mr. Jacobsen are challenging.

B. The complainants plead breach of acquired rights as defined in the case law. In their submission the amendments mean big cuts in both pay and pension, i.e. in fundamental terms of service that swayed their decision to join the Organization and to stay with it. As to the reasons for the amendments, the complainants submit that though the Organization must heed recommendations from the Assembly or the Commission it may not act in breach of contractual commitments.

C. In its reply the Organization submits that the old version of Rules 555.1 and 555.2 conferred no right to step increases. An increase was due for long service only if performance was found satisfactory over such and such a period of time. An official cannot foretell on recruitment how long the appointment will last or how performance will be rated. And the increase for merit is an exceptional benefit.

D. In their rejoinder the complainants object to the construction that the WHO puts on the old text of Rule 555.2 about increases for long service. They contend that, whereas increases for merit are granted at discretion increases for long service are due to any one who meets the requirements of seniority and good performance.

E. In its surrejoinder the Organization repeats that the increments provided for in Rule 555.2 were not awarded *ipso jure*.

F. In further submissions the complainants cite the General Assembly's resolution 49/224 of 23 December 1994, which says that any increments awarded beyond the top step of the grade shall count in reckoning pension contributions and benefits for anyone on the staff before 1 January 1994.

G. In its last brief the WHO points out that resolution 49/224 merely takes note of the amendments to its Staff Rules.

CONSIDERATIONS:

1. The complainants, who are on the staff of the WHO, challenge the lawfulness of changes that were made as from 1 February 1994 in the system of their pay. The changes took the form of amendments to align Staff Rules 550.1, 555.1 and 555.2 with the rules of other organisations in the common system of the United Nations. The complainants' objection is that the changes have reduced or utterly done away with the within-grade step increases they used to be entitled to on the grounds of merit and long service.

2. It is common knowledge that the WHO has for long been at loggerheads with the General Assembly of the United Nations and its offspring, the International Civil Service Commission, over the step increases paid to WHO staff on top of the ordinary salary scales. Those increases are granted on the strength of 20, 25, 30 and 35 years' "satisfactory" service and, in exceptional cases, of "especially meritorious" performance. The material rules used to read:

> "550. WITHIN-GRADE INCREASE
>
> 550.1 A staff member whose performance has been certified by his supervisors as being satisfactory shall be entitled to a within-grade salary increase of one step upon completion of each unit of service time as defined in Rule 550.2. ... Increases may be granted up to the maximum for the staff member's grade except that, if Rule 555 applies, the normal maximum may be exceeded accordingly."
>
> "555. MERITORIOUS WITHIN-GRADE INCREASE
>
> 555.1 A staff member whose performance has been especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member, may be granted one, or exceptionally two, extra within-grade steps. Such increase shall not affect the staff member's eligibility for normal within-grade increases, and the

> normal maximum shall be extended by the equivalent number of steps.
>
> 555.2 A staff member who has completed 20, 25 and 30 years of satisfactory service with the Organization qualifies for a meritorious increase under Rule 555.1. ..."

The Rules did not prescribe the increase for 35 years' service: the grant of it was customary.

3. The International Civil Service Commission strongly objected to the additional increments on the grounds that they offended against the uniformity of salary scales in the common system and laid further costs on the United Nations Joint Staff Pension Fund since they counted in reckoning pensionable remuneration. The Commission summed up its objections in its report for 1990 to the General Assembly (Official Records, 45th Session, Supplement No. 30, A/45/30), and the Assembly cited them in resolution 45/241 of 21 December 1990. In section VI of that resolution it expressed "concern" at "the continuing practice of some organizations to grant additional steps beyond the salary scale" it had approved, and urged the governing body of the WHO, for one, to bring the Organization's "salary scales into line with those of the other organizations of the common system".

4. The Director-General and the Executive Board went into the matter at length. The upshot was that at its 46th Session, on 14 May 1993, the World Health Assembly adopted a resolution, No. 46.38, professing willingness to keep in line with the common system, at least in theory, and instructing the Director-General to amend the Staff Rules accordingly. The resolution reads:

> "The Forty-sixth World Health Assembly ...
>
> Recalling the United Nations General Assembly resolutions 44/198 of 21 December 1989 and 45/241 of 21 December 1990 concerning the United Nations Common System, and in particular Section VI of resolution 45/241;
>
> 1. COMMENDS the Director-General and endorses his decision to amend the Staff Rules, in accordance with the requirements of the United Nations General Assembly resolution 45/241, so that no new staff joining WHO after 1 March 1993 will be eligible for extra meritorious within-grade steps after twenty, twenty-five, thirty and thirty-five years of service;
>
> 2. REQUESTS the Director-General further to amend the Staff Rules in accordance with the Staff Regulations in order that all staff who were working in the Secretariat

> before 1 March 1993 and who would have been eligible for an increase should, at the time they would have become eligible for that increase, receive one within-grade increase equivalent to the amount which would have been granted as a meritorious increase under the provisions of Staff Rules 555.1 and 555.2, and receive no more such increases thereafter."

5. The Director-General proposed amendments, the Executive Board approved them at its 93rd Session, and the Organization notified them to the staff in a memorandum, EPA/13/2/18, of 15 February 1994. The memorandum explains in 1(e) that at the World Health Assembly's instructions the Staff Rules were to be amended to abolish the grant of within-grade increases for merit to staff recruited on or after 1 March 1993 and make transitional arrangements for the others.

6. The rules which have prompted the dispute now read:

> "550. WITHIN-GRADE INCREASE
>
> 550.1 A staff member whose performance has been certified by the supervisors as being satisfactory shall be entitled to a within-grade salary increase of one step upon completion of each unit of service time as defined in Rule 550.2. ... Increases may be granted up to the maximum for the staff member's grade except that, if either Rule 555.2 or Rule 1310.9 applies, the normal maximum may be exceeded accordingly."
>
> "555. MERITORIOUS WITHIN-GRADE INCREASE
>
> 555.1 A staff member whose performance has been especially meritorious beyond that which may reasonably be expected of a normally well-qualified staff member, may be granted one, or exceptionally two, extra within-grade steps. Such increase shall not affect the staff member's eligibility for normal within-grade increases up to the normal maximum step in the grade.
>
> 555.2 A staff member whose service with the Organization commenced prior to 1 March 1993 shall qualify, with effect from 1 February 1994, for only one increase under Rule 555.1 during the remaining service in the Organization. Such increase shall be granted upon completion of either 20 or 25 or 30 years of satisfactory service, whichever occurs first after 1 February 1994. ..."

Rule 1310.9, to which 550.1 refers, is about staff in the General Service category who joined the WHO on or after 1 March 1993, who are not at issue in this case.

7. In its reply to the complaint the Organization sums up as follows the difference between old rules and new:

(a) No-one recruited on or after 1 March 1993 will qualify for the grant of a within-grade increase for "long satisfactory service".

(b) Anyone recruited before 1 March 1993 will qualify for the grant of one more increase for "long satisfactory service" on completing 20, 25 or 30 years' service, whichever period is first completed.

(c) An increase may still be granted for merit to exemplary staff, but not so as to carry the figure above the maximum allowed in each grade.

8. The effect of the above provisions is that the case turns not on two but on three successive sets of rules: the old ones, the transitional ones for serving staff, and the ones that apply to new staff.

9. The new rules prompted a great many appeals from staff. Two things emerge from the correspondence between them and the Director-General: one, the parties agreed that since the issue was purely one of law the internal appeal procedure might be waived; the other, that if complaints to the Tribunal succeeded the Administration would apply the ruling to everyone on the staff.

10. The complainants accordingly filed their common complaint on 14 July 1994, receivability is not at issue, and the proceedings went ahead in the normal way.

11. The complainants have a single plea: the amendments in memorandum EPA/13/2/18 impair fundamental terms of their contracts and so offend against their acquired rights. They cite the case law, including Judgments 61 (in re Lindsey) and 832 (in re Ayoub and others), which rule that an acquired right is any that influences an official's decision to enter, or to remain in, the organisation's service. They further plead that according to precedent monetary rights come foremost, viz. rights to the level of pay and pension: Judgment 426 (in re Settino). The transitional arrangements preserve at least some of the former entitlements of serving staff, whereas new staff are differently treated; that - they argue - is tantamount to acknowledging that those entitlements were indeed acquired rights.

12. The Organization replies on the same issue: whether or not there was breach of acquired rights. In its view no fundamental term of employment was affected. The increases that the complainants claim are just remote contingencies that

turn on how they each fare in their career. Besides, whether they will get an increase will depend on the WHO's assessment since service in the period completed must be rated "satisfactory" or else performance must be "especially meritorious".

13. The precedents have it that a right is "acquired" when someone who has it may, because of its fundamental importance to the balance of rights and duties that define the relationship of employment, demand that it be respected notwithstanding any amendment to the rules: see Judgments 61, 368 (in re Elsen and Elsen-Drouot), 832, 986 (in re Ayoub No. 2 and others) and, under 6, 1330 (in re Bangasser and others). The case law also says that no benefit - not even a long-standing one - may be treated as an acquired right if it has no logical basis: see Judgment 1241 (in re Barton and others) under 24. And a last point worth recalling is that the increases at issue here offend against the norms of the "common system", which are binding on any organisation that belongs: see Judgments 1239 (in re Baeumer and others) under 7 and 8 and 1265 (in re Berlioz and others) under 36.

14. The conclusion from the foregoing is that the amendments the WHO made to bring Rules 550.1, 555.1 and 555.2 into line with the norms of the common system are not in breach of any acquired rights.

15. The grant of an increase for merit was discretionary under the old version of 555.1 and still is under the new. By its very nature such a provision cannot confer an acquired right. So the only issue that remains is the grant of an increase for long service.

16. The complainants contend that, unlike the grant under 555.1 of an increase for merit, the grant under 555.2 of an increase for long service was not discretionary, but depended solely on the completion of the required number of years of satisfactory service. They cite WHO Manual paragraph II.5.300, which provides that such increases:

> "... are not submitted to a meritorious increase committee as they are contractually due on fulfilment of two conditions, length of service and satisfactory service ...".

In this context the use of the word "contractually" means nothing more than in accordance with 555.2. True, the Organization argues that the assessment of performance during the periods specified in former Rule 555.2 was conditional because it depended on the regular appraisal reports by supervisors. But the Tribunal is satisfied that no exercise of discretion was called for because the rule merely required the completion of a number of years and the absence during the period of any appraisal that was less than satisfactory. So the material issue is whether the amendment of 555.2 amounted to breach of an acquired right by interfering with a fundamental term of service that inclined the complainants to accept appointment.

17. For one thing, the amendment does not abolish all entitlements to increases for long service for staff recruited before 1 March 1993, but allows henceforth a single increase for each staff member. But on the broad issue as to whether such entitlements constituted a fundamental term of the complainants' appointment the Tribunal holds that the prospect of increases in emoluments after 20, 25, 30 and 35 years of satisfactory service was too remote to influence seriously the mind of the ordinary applicant in deciding to accept appointment at the WHO.

18. The conclusion from the foregoing is that the complaint is unfounded in that it seeks to perpetuate advantages which the complainants believe they are entitled to under the old rules over and above those they keep under the transitional arrangements. The complaint therefore fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot P. Pescatore

A.B. Gardner

SEVENTY-NINTH SESSION

In re BERG **Judgment 1447**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Arie Martinus Willem Berg against the European Patent Organisation (EPO) on 26 July 1994, the EPO's reply of 4 November, the complainant's rejoinder of 23 December 1994 and the Organisation's surrejoinder of 2 March 1995;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen who was born in 1947, joined the International Patent Institute in 1973 as a furniture remover and odd-job man. He was transferred to the European Patent Office, the secretariat of the EPO, on the merger of the Institute with the EPO in 1978. He was a permanent employee and was stationed at The Hague. At the material time he held a grade C3 post.

In all the two-yearly reports on his performance from 1973 to 1985 he was rated 4 ("adequate") or 3 ("good"). But from 1982 his supervisors expressed reservations about his timekeeping and the quality of his work. On 12 February 1982 he was reprimanded for taking unauthorised leave, and his supervisor took him to task in a memorandum of 27 July 1983 for not keeping office hours.

At his own request he was transferred in 1984 to the Principal Directorate for documentation as a "photocopy operator". In a letter of 7 March 1985 he told the Director of Staff Policy that he was not happy with his new duties and asked for a messenger's job.

In his report for 1986-87, his supervisor gave him the rating 5 ("unsatisfactory") on the grounds that the quality of his work had gone down, he was often out of his office and he was not "accepted" by his colleagues. In the space for his own comments he wrote that he did not agree with what the report said, but he did not formally contest it. In the draft report for 1988-89 his performance was again rated "unsatisfactory" but since he had applied for the conciliation procedure it was not put in his personal file.

In 1990 he was given the job of filing documents at the Principal Directorate for documentation. His performance improved and was rated "adequate" in his report for 1990-91.

In 1992 he had a dispute with the EPO's health insurance company over the refund of medical expenses. On 10 March 1993 he lost his temper after speaking to someone in the company and threw to the floor some papers he was holding. By a letter of 11 March the Head of the Personnel Department told him that the President of the Office would be asked to report him to the Disciplinary Committee and he was summarily suspended from duty. On 25 March 1993 the Head of Personnel informed him of the start of proceedings for dismissal and sent a copy of his supervisor's report of 18 March on the incident of 10 March. By a letter of 26 May the Director of Staff Policy informed his counsel of the President's decision to order disciplinary proceedings for dismissal and sent a copy of the report instigating them.

In its report of 21 July 1993 the Disciplinary Committee recommended that the President reconsider his decision on the grounds that the complainant's professional shortcomings were not proven. In its view the incident of 10 March warranted no more than relegation by two steps. On 5 August 1993 he was sent a draft report on his performance in 1992-93, made on the President's orders. It described his work as "unsatisfactory". By a letter of 13 August the President told him he was dismissed for professional shortcomings as at 31 May 1994. On 26 August 1993 he lodged an internal appeal against the decision.

In its report of 11 April 1994 the Appeals Committee recommended reversing the decision to dismiss him, but the President rejected his appeal in a letter of 24 May 1994, and that is the decision he is challenging.

B. The complainant pleads breach of due process. He submits that according to Article 52(2) of the Service Regulations the Head of Personnel should in his letter of 25 March 1993 have given the reasons for the proposal of dismissal. He mentioned only the incident of 10 March, which in itself afforded insufficient grounds for such drastic action. Citing the case law of the Court of Justice of the European Communities, he contends that the Organisation's failure to complete his staff reports for 1988-89 and 1992-93 precluded taking his whole career into account.

On the merits he pleads two flaws. First, the Organisation failed to discharge the burden of proof of his professional incompetence. It may not rely on the reports for 1988-89 and 1992-93 since they were not put on his file, and it has produced no other evidence in support. Secondly, citing the Disciplinary Committee's report, he contends that an employee may not be dismissed unless there are two consecutive staff reports rating his performance "unsatisfactory". There were not.

He submits that the real reason for his dismissal was financial: the EPO wants to save money on staff.

He asks the Tribunal to quash the dismissal; order the Organisation to pay him the sums he would have earned from 1 June 1994 up to the date of judgment, plus interest; reinstate him as from 1 June 1994 or pay him damages equal to the sums he would have earned from the date of judgment up to the date of his retirement; to repay all the expenses his dismissal caused him, such as the costs of removal and sickness insurance premiums, plus interest; and to award him costs and 20,000 guilders in moral damages.

C. In its reply the Organisation points out that the complainant did not in his internal appeal claim moral damages, repayment of his removal costs or payment of his salary until retirement; so those claims are irreceivable.

In the EPO's submission the Appeals Committee misconstrued Article 52(1) of the Service Regulations: dismissal for professional incompetence is a matter of discretion, not just of "quasi-mathematical assessment" of ratings in staff reports.

It denies procedural flaws: it was the letter of 26 May 1993 from the Director of Staff Policy that actually set off the dismissal proceedings; and appended was an introductory report giving the reasons for his dismissal. The Administration neither produced his reports for 1988-89 and 1992-93 during the disciplinary proceedings nor took account of them in deciding to dismiss him.

The complainant's work had long been unsatisfactory and he was so warned as long ago as 1982. Although his performance was better in 1990-91, it lapsed again the following year. The Organisation tried to help by transferring him in 1984 and agreeing not to put the 1988-89 report in his personal file. But the incident of 10 March 1993 and his 1992-93 report made it plain he was unfit for the international civil service. So the allegation that he was dismissed for financial reasons is unfounded.

At all events even if his complaint were allowed his reinstatement would be quite out of the question.

D. The complainant maintains that all his claims are receivable. The additional ones derive from the final decision to dismiss him, which had not yet been taken when he lodged his internal appeal. He submits that his performance was not consistently unsatisfactory and the Organisation never warned him. His work continued to improve after 1992, and the incident of 10 March 1993 was due to personal problems and had no bearing on his professional competence.

E. In its surrejoinder the Organisation presses all its pleas. It again points out that the complainant's supervisors expressed reservations in his staff reports and maintains that it did give him ample warning that his work was unsatisfactory. Dismissing him was therefore in its interests.

CONSIDERATIONS:

1. The complainant, a Dutchman who used to work for the EPO as an odd-job man, is challenging his dismissal for professional incompetence. Having been found medically unfit for some of his duties, such as the moving of furniture, he was transferred on 21 August 1984 to the Principal Directorate for documentation as an operator of photocopying equipment. From about 1990 he was engaged in the "maintenance and updating of the numeric collection of non-patent literature", known as "XP documents", and performed other "small administrative tasks".

2. An incident involving the complainant occurred in the afternoon of 10 March 1993. On learning that the insurer which covered EPO employees would not meet the cost of an operation performed on his wife, he had an outburst of rage and threw files containing XP documents to the floor of his office. Though the papers were gathered together and there is no evidence of any loss, some damage may have been caused to them. On 11 March the Head of Personnel suspended the complainant pending disciplinary action.

3. On 25 March 1993 the Head of Personnel sent the complainant a report dated 18 March by his first-level supervisor about the incident of 10 March, asked him to comment and announced a proposal "to initiate a procedure for your dismissal in accordance with Articles 52 and 100 of the Service Regulations". The report referred to the incident and added, without particulars, that the complainant's work and timekeeping had never been satisfactory.

4. Article 52 of the Service Regulations provides:

> "(1) Subject to Article 23 of the Convention, a permanent employee who proves incompetent in the performance of his duties may be dismissed.
>
> The appointing authority may, however, offer to classify the employee concerned in a lower grade and to assign him to a post corresponding to this new grade.
>
> (2) Any proposal for the dismissal of a permanent employee shall set out the reasons on which it is based and shall be communicated to the employee concerned. He shall be entitled to make any comments thereon which he considers relevant.
>
> The appointing authority shall take a reasoned decision, after following the procedure laid down in regard to disciplinary matters.
>
> ..."

5. By a letter dated 19 April 1993 the complainant's counsel replied that the incident of 10 March had not occurred in isolation, that his outburst of rage had not been without cause and that he had neither intended to damage the papers nor actually damaged them. The letter briefly denied the allegation that his work and time-keeping had never been satisfactory.

6. By a letter of 26 May the Director of Staff Policy informed the complainant's counsel that the President had decided to start disciplinary proceedings for dismissal, and he appended a copy of the introductory report submitted to the Disciplinary Committee in accordance with Article 100. That report referred to the incident and to appraisals of the complainant's performance in staff reports and contained allegations of several earlier defaults and lapses. It submitted that they amounted to professional incompetence justifying dismissal under Article 52 and that the incident had been a serious breach of the complainant's obligations under Article 14 and one that warranted dismissal under Article 93(2)(f).

7. The complainant's performance was assessed as follows:

(a) Between 1973 and 1985 it was rated either 4 ("adequate") or 3 ("good") on a scale ranging from 1 ("outstanding") down to 5 ("unsatisfactory").

(b) His performance in 1986-87 was assessed as "unsatisfactory". The next completed appraisal, for 1990-91, rated his performance "adequate" and commented that "the improvement which Mr. Berg has been promising for years, seems to materialise slowly".

(c) Although a draft report for 1988-89 assessed his performance as "unsatisfactory" it was never completed.

(d) On 26 May 1993 - the very day on which the Director of Staff Policy informed his counsel by letter that disciplinary proceedings had started - the President of the Office ordered assessment of his performance from 1 January 1992 to 11 March 1993. A draft report dated 5 August 1993 rated his performance "unsatisfactory". He expressed disagreement, and again the report was never completed.

8. In its report of 21 July 1993 the Disciplinary Committee held that Article 52 of the Service Regulations did not apply to misconduct in general but only to professional incompetence, i.e. inability to discharge duties; that two consecutive unsatisfactory appraisals were usually necessary to establish such incompetence; that the complainant's behaviour on 10 March 1993 had no bearing on his ability to discharge his duties; that in any event he had never had two consecutive unsatisfactory appraisals; and that professional incompetence had therefore "not been proven". The Committee did, however, hold that, though he had not intended to damage the papers, his conduct had been in breach of his obligations under Articles 14 and 24 of the Service Regulations. It recommended relegation by two steps under Article 93(2)(d) on the grounds that dismissal was "too severe" a measure.

9. By a letter of 13 August 1993 the President informed the complainant that, though he agreed that the incident was a breach of duty warranting relegation in step, he considered dismissal for professional incompetence to be amply justified and dismissal would take effect at 31 May 1994.

10. The complainant appealed against that decision. In a report dated 11 April 1994 the majority of the Appeals Committee expressed the view that the "proposal", within the meaning of Article 52(2), for dismissal of the complainant was in the Head of Personnel's letter of 25 March 1993 to him, together with the report of 18 March 1993; that since that letter had asked him to comment only on the incident of 10 March 1993 the proposal to dismiss him had been based solely on his "misbehaviour"; and that the incident alone was insufficient to justify dismissal. The majority further held that, though the report of 18 March 1993 made "two references to other possible reasons for the proposal", it gave no indication of the other grounds that the EPO was later to put

forward in its brief of 10 January 1994 in reply to his appeal; so that report was not the proper statement of reasons required by Article 52. The majority believed that any determination of professional incompetence had to take into account an employee's career as a whole; that the complainant's performance had been rated unsatisfactory only in 1986-87 and had actually improved in 1990-91; and that it was a procedural error to take into account the incomplete staff reports for 1988-89 and 1992-93 in deciding to dismiss him. The majority recommended setting aside the decision. It did not say whether disciplinary action should be taken under Article 93 of the Service Regulations.

11. By a letter of 24 May 1994 the Director of Staff Policy informed the complainant that the President did not accept the recommendation by the majority of the Committee. He considered that the procedure for dismissal had been correctly initiated because a proper statement of reasons had been appended to the letter the Director had sent him on 26 May 1993; that the incomplete appraisals for 1988-89 and 1992-93 had "never motivated" the dismissal; and that if the complainant's career were taken as a whole his "professional insufficiency" had been established and there was "no prospect of improvement". That is the impugned decision.

12. The Organisation submits that it made no procedural error over the statement of the reasons for dismissal. It was its letter of 26 May 1993 "which actually set the dismissal proceedings in motion" and the complainant had ample opportunity to reply and did in fact reply to the charges before the Disciplinary Committee.

13. The Tribunal holds on that score that the proposal to dismiss the complainant for professional incompetence within the meaning of Article 52 was the letter which the Head of Personnel wrote to him on 25 March 1993 and which is referred to in 3 above. That letter was mainly about his "behaviour on the afternoon of 10 March 1993". That incident was neither so serious as to warrant dismissing him on disciplinary grounds nor of any relevance to his professional competence.

14. The letter which the Director of Staff Policy wrote to his counsel on 26 May 1993, and which is referred to in 7(d) above, was not the proposal within the meaning of Article 52 but gave notice of the start of proceedings before the Disciplinary Committee and that a report on disciplinary action which was appended to the letter had been forwarded to the chairman of the Disciplinary Committee in accordance with Article 100. By including in that appended report other allegations that had not been made in support of the proposal for dismissal and by adding a distinct charge of misconduct

warranting dismissal under Article 93 the Organisation caused the complainant undue prejudice.

15. Even if the additional charges against him in that report were admissible in support of a proposal under Article 52 the Organisation nevertheless offered no convincing evidence of his continuing inability to fulfil his professional duties. If the incomplete performance appraisals for 1988-89 and 1992-93 are discounted, as the President of the Office himself discounted them, his performance, as summed up in 7 above, shows not incompetence, but some improvement.

16. As for the charge of misconduct warranting dismissal under Article 93(2)(f), the Tribunal accepts the Disciplinary Committee's ruling that the complainant had no intention of causing damage in the incident of 10 March 1993. It is therefore satisfied that the sanction of dismissal was grossly disproportionate to his misbehaviour on that day.

17. The conclusion is that the impugned decision shows errors of procedure and of law and cannot stand, there being no need to entertain the complainant's further objections thereto. He has been wrongfully dismissed, and there are no proven facts which make his reinstatement "not possible or advisable" within the meaning of Article VIII of the Tribunal's Statute. The Organisation must reinstate him and pay him salary, allowances and other entitlements as from 1 June 1994. He need not give credit for any sums he may have earned since that date. For that reason he is awarded no sum in moral damages, even assuming that his claim to such damages is receivable. Though he claims damages on account of expenses he allegedly incurred because of dismissal, he has given no details whatever, and again no award will be made under that head. But since he has succeeded in the main his claim to costs is allowed, and the Tribunal sets the amount at 8,000 guilders.

DECISION:

For the above reasons,

1. The President's decision of 24 May 1994 is quashed.
2. The European Patent Organisation shall reinstate the complainant and pay him salary, allowances and other entitlements as from 1 June 1994.
3. It shall pay him 8,000 guilders in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

W. Douglas P. Pescatore

William Douglas P. Pescatore Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re PEREZ-VENERO

Judgment 1448

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alejandro Perez-Venero against the United Nations Industrial Development Organization (UNIDO) on 29 March 1994 and corrected on 6 July, UNIDO's reply of 6 October 1994, the complainant's rejoinder of 10 January 1995 and the Organization's surrejoinder of 20 April 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Panamanian who was born in 1941, joined UNIDO in 1973 on a grade P.2 appointment. He was promoted to grade P.3 in 1977 and given a permanent appointment in June 1987. In 1993 he was transferred to the Coordinating Unit of the Industrial Development Decade for Africa.

In 1993 UNIDO started a procedure for the retrenchment of staff. The criteria and arrangements were explained in two bulletins issued by the Director-General on 21 June and 23 August 1993.

In a notice of 1 October 1993 the Personnel Services Division informed the staff that the action so far taken, which had led to "56 voluntary separations", was not enough to balance the books and that as a last resort terminations would therefore prove necessary.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division warned the complainant that he was one of those who were likely to have to go shortly. Citing the Director-General's bulletin of 21 June 1993, he said that the decision had been taken after "thorough review of priority programmes and staffing requirements".

On 1 November 1993 the complainant sent the Director-General a memorandum asking for review of the decision but he got no answer.

In October and November 1993 he had talks with a personnel officer about the arrangements for separation and financial compensation. At a meeting on 5 November with that officer he signed a memorandum bearing the same date, headed "Request for agreed termination" and claiming payment of termination indemnity equivalent to 12 months' salary in accordance with Staff Regulation 10.6(a); an additional indemnity of 50 per cent of the above amount; special leave with full pay from 1 January to 31 March 1994; special leave without pay from 1 April 1994 to 31 March 1996, during which the Organization would continue to contribute for him to the health insurance scheme and pension fund; and three months' salary in lieu of notice.

On 10 November 1993 the personnel officer gave him a letter bearing that date in which the Director of the Personnel Services Division notified the Director-General's decision to terminate his appointment on the terms in the memorandum of 5 November. A rider said that he agreed not to challenge the termination. He signed at the personnel officer's request.

B. The complainant pleads flaws in the procedure for the retrenchment of staff. No specific criteria were published or applied. The Administration showed bias against him and never informed him of the reasons for termination. He met none of the conditions in the Director-General's bulletin of 21 June 1993. The Organization failed to let him have equal treatment and in 1993 the Director-General had deliberately shifted him to a more "vulnerable" post.

Secondly, he contends that by not trying to reassign him to another post the Organization infringed his rights under the rules and his contract of service. It ought to have offered him reappointment once restructuring was over, especially since the programme he had been working on had priority.

Thirdly, he alleges breach of the rule of geographical distribution: there is now not a single Panamanian on the staff of UNIDO.

Lastly, he contends that he did not give consent freely but signed the "agreed termination" only under duress. The personnel officer threatened to cut his indemnity if he refused to sign, failed to alert him to his rights and pushed him into making up his mind. It was deceitful of the Administration to add to its letter of 10 November 1993 the rider that he would not challenge the decision. He submits that the letter has no force in law.

He seeks material damages equivalent to the earnings he would have had up to the age of 60, plus UNIDO's contributions to the health insurance scheme and pension fund; an award of moral damages in the amount of 50,000 United States dollars if his first claim is met, and of 200,000 dollars if it is not; an award of 50,000 dollars in damages for moral injury to his wife; damages for moral injury to his children in the form of a letter of apology from the Director-General; a letter of recommendation from the Organization; the filing of his latest performance appraisal; a letter from UNIDO explaining the requirements for a repatriation grant; another letter setting out his removal entitlements, which he is to conserve for one year after he reaches the age of 60; a letter setting out his own and his wife's entitlements to the cost of travel by air to Panama City up to the same deadline; the right while he is on special leave without pay to take on any work not in conflict with UNIDO's interests; and costs.

C. In its reply the Organization submits that the complaint is not receivable. In its view the complainant is treating his memorandum of 1 November 1993 as an internal appeal against its own one of 4 October. Its memorandum was not a challengeable final decision, and he never challenged the final decision in its letter of 10 November; indeed there was a rider to that letter saying he would not.

The Organization argues, on the merits, that the procedure for staff retrenchment was quite lawful. All its competent bodies approved that way of balancing the books and at the same time doing what was expected of it. The choice of the complainant was not arbitrary but met specific criteria that the Director-General had announced, for example in the bulletins of 21 June and 23 August 1993. Since the criteria applied to everyone alike the complainant may not plead breach of equality. The memorandum of 4 October was sent to 55 other officials. So the Director-General acted in exercise of the authority vested in him by Article 11(3) of the Organization's Constitution, which makes him responsible for the appointment, organisation and functioning of the staff.

The complainant must have known the circumstances in which he came to be dismissed. Besides, the duty to give reasons applies first and foremost to unilateral decisions, not to cases where termination is agreed under Regulation 10.3(b).

The Organization did try to place him but found no suitable post. Besides, he should have raised the issue before signing the letter of 10 November. There was no reason to put him on another post after the restructuring since what he was doing had not been considered to be essential or to warrant priority.

The principle of geographical distribution confers no rights on staff.

The Organization put no pressure on him: the personnel officer never threatened to reduce his indemnity, set no deadline, and did not try to trick him. The rider waiving his right of appeal was just a precaution the Organization took for the sake of proper administration.

D. In his rejoinder the complainant maintains that his complaint is receivable: the memorandum of 4 October 1993 was a final decision and showed many flaws. He presses all his pleas on the merits. He produces copious correspondence between members of his family and the Director-General's Office to show that he never consented to termination. He refers to recordings of talks with people in the Personnel Services Division and again pleads duress.

E. In its surrejoinder the Organization reaffirms that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress. It maintains that the procedure that led to the termination of his appointment was entirely lawful and that he was quite aware of his rights under the material rules.

CONSIDERATIONS:

1. The complainant joined UNIDO at its headquarters in Vienna in 1973 at grade P.2 under a fixed-term contract for two years. After a series of fixed-term contracts and promotion to P.3 he received a permanent appointment on 1 June 1987. The Organization financed all his appointments under its regular budget. On 1 May 1993 it transferred him as programme officer to the Coordinating Unit of the Industrial Development Decade for Africa, a post that the Organization financed under its operational budget. He contends that the Director-General gave him "notice of dismissal" on 4 October 1993 and took no action upon his request of 1 November 1993 for reconsideration of the decision to dismiss him. The relief he seeks is summed up in B above.

2. The Organization decided in 1992 that the Director-General should take steps to balance the operational budget by the end of 1993 at the latest by various means including the retrenchment of staff.

3. In a bulletin dated 21 June 1993 the Director-General announced that "the continuing depletion of financial resources

caused by the shortfall in income from the operational budget" had made savings necessary and they would include the reduction of staff through voluntary measures, restrictions on recruitment, attrition through resignation and retirement, the expiry of fixed-term appointments, and termination. The last was to include action to terminate an appointment "on a mutually agreed basis", known as "agreed termination". Although several staff members applied for voluntary separation, further separations were considered necessary. So the Director-General issued a second bulletin on the subject on 23 August 1993.

4. Both bulletins drew attention to the offer of incentives which included payment of a termination indemnity under Staff Regulations 10.6(a) and, if funds permitted, 10.6(b), and the grant of special leave without pay for extended periods to staff members who were only two or three years short of early retirement at the age of 55, together with measures to protect health insurance and pension benefits until they reached that age. Staff were offered confidential advice from the Personnel Services Division on their options.

5. Regulations 10.3 and 10.6 provide:

> "10.3(a) The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff ...
>
> (b) The Director-General may also terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and is not contested by the staff member concerned."
>
> "10.6(a) If the Director-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Director-General in accordance with the rates and conditions set out in schedule IV of the present regulations.
>
> (b) The Director-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member whose permanent appointment is terminated under regulation 10.3(b) a termination indemnity not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations and Staff Rules."

6. The outcome was 56 voluntary separations. Since that figure was thought not yet enough to achieve the desired savings, the Personnel Services Division announced in a notice

dated 1 October 1993 that termination by the Director-General would eventually be necessary if voluntary measures proved insufficient and that staff "whose appointments are foreseen for termination" would be invited in the next two weeks to discuss the terms of separation, which might include the special arrangements offered in the two bulletins.

7. On 28 October 1993, just after he had come back from home leave, the complainant got a memorandum dated 4 October 1993 telling him that he was "among those staff members whose appointments with UNIDO [were] likely to be terminated in the near future" and that the Personnel Services Division would be in touch with him to "discuss the modalities of separation ... and ... entitlements". That is the document which the complainant contends was "notice of dismissal".

8. It appears that the complainant saw a personnel officer four times, on 28 October and on 2, 5 and 10 November 1993, though there is much disagreement over what happened.

9. The complainant says that at his second meeting with the personnel officer, on 2 November, they discussed "agreed termination" and the officer mentioned, among other matters, the payment of termination indemnities, including a payment of 90 per cent in a lump-sum advance and of three months' salary in lieu of notice, the payment of health insurance and pension fund contributions during that period, grants for repatriation and removal of household goods, and commissary rights. The complainant says that, although at the first meeting, on 28 October, there had been only brief discussion and he had been able only to jot down, incompletely and in a general way, some of the information given, at the second meeting he was handed a detailed typewritten note to consider.

10. At the third meeting, on 5 November, the personnel officer dictated to a secretary a memorandum for the complainant to sign, taking the details from the same typed note, which he had brought back with him. The complainant signed the text, which bore that day's date. The text referred to the memorandum of 4 October 1993 and requested the "agreed termination" of his permanent contract on the following conditions:

(1) the payment of twelve months' termination indemnity in accordance with Staff Regulation 10.6(a), increased by 50 per cent;

(2) the grant of special leave with full pay from 1 January to 31 March 1994 and of special leave without pay thereafter until 31 March 1996, during which period the Organization would pay its share of health insurance and pension fund contributions; and

(3) the payment of three months' salary in lieu of notice.

11. At their fourth meeting, on 10 November 1993, the personnel officer handed the complainant a letter of even date signed by the Director of the Personnel Services Division. It gave him notice that in response to his request of 5 November for termination the Director-General agreed to end his appointment under Regulation 10.3(b) at 31 March 1996. It stated that he would be entitled, over and above the benefits set out in the memorandum of 5 November 1993, to lump-sum payment at the end of December 1993 of 90 per cent of the termination indemnities as well as to compensation for accrued annual leave and to the repatriation grant. The letter contained the following clause:

> "I confirm my agreement to termination of my permanent appointment in accordance with Staff Regulation 10.3(b) (copy attached) and under the conditions outlined above and, accordingly, I will not contest this agreed termination."

12. The complainant says that he objected to the clause saying he would not contest the termination, because he considered it illegal, but he signed nevertheless because the personnel officer assured him that it was "standard procedure".

13. The complainant had written to the Director-General on 1 November 1993 to say he was shocked at receiving what he called "notice of dismissal" and to ask for reconsideration. Yet after receiving the actual notice of termination dated 10 November 1993 he made no appeal whatever to the Director-General. Indeed, although he wrote as late as 21 February 1994 to the Director of the Director-General's Office describing his separation as irregular, unethical and illegal, he was quite explicit that that letter, like an earlier one of 29 November 1993, was "not valid as a legal document of grievance". He also said that he sought only a fairer offer of compensation by renegotiating the financial terms of separation.

14. While the complainant alleges that "UNIDO acted not only unethically in separating [him] from UNIDO, but also illegally", he does not "seek re-integration at UNIDO as long as the current administration is in power". He contends, first, that in picking on him for possible termination the Organization arbitrarily singled him out without stating any reason, observing the principle of equitable geographical distribution or taking time to consider him for other posts; and, secondly, that his request for termination and his agreement not to contest it were secured by deception, threats and duress. Accordingly, he maintains that the decision notified to him on 4 October 1993 and the agreed termination communicated on 10 November 1993 were fatally flawed.

15. While rejecting those contentions, the Organization pleads that the complaint is irreceivable. It says that the

decision that the complainant challenged in his memorandum of 1 November 1993 was not the final one. The actual decision by the Director-General to terminate his appointment was notified to him on 10 November 1993, and he not only expressed his agreement then but failed thereafter to contest either the termination or his agreement thereto.

16. Staff Rule 112.02 provides that a staff member may appeal against an administrative decision by addressing a letter to the Director-General within sixty days of the notification of that decision and that if he receives no reply within the next sixty days he may appeal to the Joint Appeals Board.

17. The Tribunal holds that the decision notified to the complainant by the memorandum of 4 October 1993 was not a final one, the object of that memorandum being only to initiate discussion: see Judgment 336 (in re Hayward). Although he had been identified as a staff member "likely to be terminated", there was at that time no actual decision that he would be terminated at such and such a date or on stated terms; nor had any such decision been communicated to him. So he was mistaken in assuming that the memorandum of 4 October 1993 constituted notice of dismissal. His contention that the Director-General failed to answer his memorandum of 1 November 1993 is also mistaken because what he was challenging in that memorandum was not a final decision.

18. Not until 10 November 1993 was the final decision to terminate his services communicated to him. But he failed to submit an appeal to the Director-General within the sixty days prescribed by the Staff Rules and thereby failed to exhaust the internal means of redress available to him. Accordingly, his complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

19. The complaint being irreceivable, it is unnecessary to consider the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re HALD

Judgment 1449

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Elisabeth Maria Catherina Josephina Hald against the World Health Organization (WHO) on 15 April 1994 and corrected on 20 May, the WHO's reply of 18 August, the complainant's rejoinder of 15 November 1994 and the Organization's surrejoinder of 20 February 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchwoman, has been employed by the WHO since 1984 in the General Service category of staff at its Regional Office for Europe at Copenhagen (EURO). The Organization pays her child allowance for each of her two dependent children.

Because of changes in national tax law the Danish Government began on 1 July 1987 making tax-free lump-sum payments for any dependant under the age of 18 who is resident in Denmark provided that at least one parent is "liable" to taxation in the country, whether or not that parent actually has to pay income tax. The payment is known in Danish as "Bornefamilieydelse" (BFY), i.e. "child" or "family allowance"

Under revision 32 of the "Employment conditions for staff in the General Service category", which was in effect when the BFY came in, payment by the WHO of its own allowance for a dependent child "is subject to the provision that a staff member having an entitlement shall have the allowance reduced by the amount of any benefit paid from public sources by way of social security payments by reason of such child".

Revision 33, which was distributed on 25 January 1990 but took effect from 1 October 1988, stipulated that the benefits to be docked from the WHO's child allowance would include any paid from public sources "by way of social security payments, or under public law ...".

There was discussion between "concerned parents", the complainant among them, and the Administration about whether the WHO should dock the amount of the BFY from the child allowance.

A personnel officer announced in a memorandum of 22 November 1989 to the General Service staff at the Regional Office that "all allowances received under public law, including the child-family allowance, must be deducted" but that such deductions would take effect only as from 1 January 1990.

On 27 March 1990 the complainant, acting "as a representative for a group of concerned staff members", lodged a statement of appeal with the regional Board of Appeal alleging that the words "under public law" in the revised employment conditions were inappropriate and that the Administration had failed to consult the staff about the revision as it must under Staff Rule 920. She asked the Administration (1) to go back to the wording in force before revision 33, (2) not to deduct the BFY from the child allowance and (3) to refund her costs.

In its report of 31 January 1991 the regional Board recommended return to the former text or finding "a new wording" but continuing to deduct the BFY from the child allowance, albeit as from 25 April 1990. It also said that the wording of the Staff Rules "should be improved" and the complainant should get costs.

In a letter dated 5 March 1991 the Regional Director told her that he had decided to ask "headquarters" to give effect to the deduction of the BFY from the child allowance as from 1 March 1990 and agreed to pass on the regional Board's views about recasting the rules.

By a memorandum of 24 April 1991 the Director of Personnel told the Regional Director that the Director-General saw no need to rephrase the rules or put off the deductions until 1 March 1990.

On 29 April 1992 the complainant appealed to the headquarters Board of Appeal. In its report of 19 November 1993 the headquarters Board recommended dismissing her case but paying her the costs of travel to Geneva.

By a letter of 18 January 1994, which she impugns, the Director-General endorsed the headquarters Board's recommendations.

B. The complainant submits that the impugned decision is unlawful. The WHO added the words "under public law" to the terms of employment to deprive her of "Danish tax alleviation" in the form of the BFY because it is not a social security benefit. In any event the WHO may not reckon dependants' allowances on the basis of tax rebates.

She pleads breach of equal treatment inasmuch as the Administration denies the BFY to officials in the General Service category but lets staff in the Professional category benefit from it. The policy also prevents single or divorced parents from getting either the BFY or the WHO allowance.

She alleges procedural flaws in the internal appeal procedure.

She asks the Tribunal to declare invalid the outcome of her two appeals, and order the WHO to revert to the "former wording" of the conditions of employment, "thus restoring the right of the appellant and other [General Service] staff in EURO to receive BFY without a corresponding reduction in WHO child allowance".

C. In its reply the WHO contends that the deduction of the BFY from the child allowance is lawful. The employment conditions having been properly revised and the staff association duly consulted, it was bound to deduct from the allowance a publicly funded benefit for a dependent child.

In revising the terms of employment the WHO sought to avoid double payments to some of its staff and to bring conditions of employment into line with the rules and with the best prevailing practice in the area. Even if revision 32 remained in force the Administration would have to deduct the BFY from the allowance, as the case law bears out.

The WHO says it also deducts the BFY from the child allowance it pays to staff in the Professional category. It denies discriminating against single or divorced parents and mishandling the complainant's case.

D. In her rejoinder the complainant points out what she sees as inconsistencies in the WHO's reply. The gist of her argument is that the BFY is not a social security payment. Unlike precedents on which the Organization relies, her case turns on tax matters, not social benefits. She says there is no evidence to suggest that the Director-General delegated authority to the Director of Personnel to revise the conditions of employment.

She further seeks "reimbursement in full" of her costs, including those she incurred for appeal to the headquarters Board.

E. In its surrejoinder the WHO produces evidence of delegation of authority by the Director-General to the Director of Personnel.

It submits that what matters is not whether a benefit is "referred to" as a social security payment or a tax allowance but what its "essential purpose" is: the BFY and the child allowance serve one and the same purpose.

As to the complainant's claim to refund of the costs she incurred on appeal, the WHO observes that it has already offered to refund the cost of her travel to Geneva, and that is enough.

CONSIDERATIONS:

1. The complainant has been employed by the WHO's Regional Office for Europe at Copenhagen since 1 November 1984. She works in the Strategic Planning and Evaluation Unit and holds a grade - C.06 - in the General Service category of staff. The Organization pays her child allowance for each of her two dependent children.

2. Until the end of June 1987 the Danish State paid to some parents an allowance for a dependent child which was known as the "Bornetilskud". The Organization deducted the amount of any such payment from the allowance it paid to a staff member in the General Service category who had a dependent child. It did so in pursuance of clause II.1 of the "Employment conditions for staff in the General Service category" (revision 32), which provided that the child allowance should be reduced by "the amount of any benefit paid from public sources by way of social security payments by reason of such child".

3. On 1 July 1987 the Danish Government introduced a benefit known as the "Bornefamilieydelse" (BFY). It is a tax-free lump-sum payment made in respect of any dependant under the age of 18 who is resident in Denmark. It is paid to the parents of a dependent child, whatever their income may be, as long as at least one of them is liable to taxation in Denmark.

4. By revision 33, distributed on 25 January 1990 but effective as from 1 October 1988, the Organization amended the employment conditions for staff in the General Service category to provide that the allowance it paid for a child should be "reduced by the amount of any benefit paid from any public source by way of social security payments or under public law, by reason of such child". The amendment consisted in the insertion of the phrase "or under public law".

5. A personnel officer announced to all General Service staff in the Regional Office by a memorandum of 22 November 1989 the decision to deduct the amount of the BFY from the child allowance as from 1 January 1990. The complainant challenged the decision in an appeal of 27 March 1990 to the regional Board of Appeal. Her appeal having failed, she went on 29 April 1992 to the headquarters Board of Appeal. The headquarters Board unanimously recommended rejecting her appeal, the Director-General informed her by a letter of 18 January 1994 that he did so, and that is the decision she is impugning.

6. The complainant argues that the BFY is not a social security payment; that it does not replace the allowance known as the Bornetilskud that was deducted from the WHO child allowance; that the revision of the employment conditions for General Service staff was invalid; and that its purpose was to prevent such staff from getting tax relief. The Organization replies that the amendment was valid and that the BFY is deductible from the child allowance because it is a payment "by way of social security". It is not in dispute that, to quote the material rule, payment is made from a "public source" and "by reason of" a dependent child.

7. In Judgments 1296 (in re Cook) and 1297 (in re Theuns No. 3) the Tribunal ruled on somewhat similar claims in cases which were brought against the European Patent Organisation (EPO) and which were about payment of a state child allowance in the Netherlands. There the issue was whether the child allowance paid by the Dutch State was "of like nature" to the dependant's allowance paid by the EPO. The Tribunal held that both the state allowance and the EPO allowance were paid on account of the dependency of the child and the social obligations of the parent. Their purpose was the same, namely to contribute to the costs of child maintenance.

8. Here the text to be interpreted is different, the issue being whether the BFY is a benefit paid "by way of social security payments". The term "social security" has not been given any fixed narrow meaning in revision 33 but is a way of describing payments to the citizen which from country to country may be variously referred to as social or social security benefits, social welfare payments, family allowances, child benefits, and so forth: the essence of them is that their purpose is to meet social needs.

9. The State collects taxes, the levy being usually eased by means of tax relief, i.e. money that the State forgoes. The purpose of such tax relief will vary according to the government's objectives. It may be to foster industry, encourage the export trade, increase employment, alleviate poverty or disability, or lighten the parents' financial burden in bringing up children. In the last case parents may get tax relief in respect of a child which is unrelated to any income

the child may have: it is tantamount to an additional personal allowance for the tax-paying parent. Or, as in Denmark, tax relief may be granted, up to a ceiling, on a child's income.

10. In many countries the State also disburses social benefits to those who have social needs. If payment is subject to a means test, then of course only someone who qualifies will receive the benefit. But legislation may also provide that the State may claw money back where income is above certain ceilings, the benefit paid by the State being treated in effect as taxable income. Alternatively, legislation may provide that a benefit which is not means-tested is also tax-free.

11. The Bornetilskud was a means-tested allowance. As part of the reform of taxation in Denmark, it was abolished - except for the single or divorced parent - and at the same time tax relief was reduced for any income of the child. By way of replacement the BFY was introduced as a tax-free benefit that is paid to parents regardless of their income, provided that one of them is liable to Danish tax.

12. The complainant contends that the BFY is a tax allowance, not a social security benefit. That is not so. Once legislation was passed reducing the tax relief on the child's income, the amount of the reduction ceased to be a tax allowance. That reduction of the tax allowance coupled with the elimination of the Bornetilskud resulted in a new form of social benefit. The fact that the history of the BFY may be traced back to a tax allowance does not mean that it is itself such an allowance. The Danish State has replaced a means-tested child benefit, the Bornetilskud, with a tax-free benefit for all parents which is not means-tested, at the same time reducing the tax relief on the child's income. The BFY has all the attributes of a social security payment and none of a tax allowance. The requirement that one of the parents be liable to Danish tax does not alter the nature of the benefit.

13. Since the Organization succeeds in the plea that the BFY is a payment made by way of social security, it lawfully deducted the amount of the BFY from its own child allowance. There is therefore no need to rule on the complainant's various other pleas.

14. The conclusion is that the complainant's claims fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Michel Gentot
Michel Gentot

Mella Carroll
Mella Carroll

A B Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re KOCK, N'DIAYE and SILBERREISS — Judgment 1450

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. Thierry Silberreiss on 25 February 1994 and by Mrs. Bérénice N'Diaye on 10 March and corrected on 27 April, the EPO's replies of 20 July, the complainants' rejoinders of 31 October 1994 and the Organisation's surrejoinders of 20 January 1995;

Considering the complaint filed against the EPO by Mrs. Marion Kock on 9 June 1994 and corrected on 29 July, the Organisation's reply of 21 October 1994, the complainant's rejoinder of 11 January 1995 and the EPO's surrejoinder of 17 February 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering that the complainants have applied for joinder, that the Organisation does not object and that the three complaints may therefore be formally joined for the purposes of this judgment;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the case arises out of the rejection of the complainants' claims to the grant of permanent appointments with the Organisation upon expiry of their fixed-term contracts and that the parties' claims are as follows:

The complainants:

1. The grant of permanent appointments with retroactive effect from the date of expiry of their fixed-term contracts;
2. failing that, awards of material and moral damages equivalent to two years' salary;
3. costs.

The defendant:

Dismissal of the complaints.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants joined the staff of the EPO in 1991 and 1992 as auxiliary staff under fixed-term appointments for two years. Appended to their contracts was the text of a decision which the Administrative Council of the EPO had taken on 17 January 1986, and which read in part:

> "Conditions of employment shall otherwise be governed by the employment and social welfare legislation in force at the place of employment; this shall also apply to matters of recourse to the national courts."

On 12 November 1993 and 6 April 1994 the complainants appealed to the President of the European Patent Office, the secretariat of the EPO, against decisions not to renew their appointments and asked for permanent appointments.

The EPO refused in letters of 26 November 1993 and 27 April 1994.

In the meantime the complainants filed suit with the German courts. As the court of first instance the employment tribunal of Berlin made a ruling on 22 February 1994 on the case of Mr. Silberreiss, the only one of the three to complete the procedure. The ruling was that the German courts lacked competence and would not entertain his case. On 12 September 1994 the appellate court, the employment tribunal of the State of Berlin, upheld the ruling.

B. The complainants submit that the clause in their contracts limiting their appointments to two years offends against German law. They deny that their duties were temporary. They allege a judicial void and say that the EPO has acted in breach of good faith by pleading immunity in the German courts.

C. The EPO replies that sound personnel management called for the introduction of a category of temporary staff; that on recruitment the complainants consented to the clause limiting the period of their appointment; and that Judgment 1311 (in re Guerra Ardiles) acknowledged that the law of the international civil service prevailed over municipal law.

D. In their rejoinders the complainants challenge the EPO's account of the facts and argue that the German version of the clause is ambiguous.

E. In its surrejoinders the Organisation presses all its pleas.

CONSIDERATIONS:

1. The EPO recruited the complainants as auxiliary staff under contracts of service that were limited to two years. Mr. Silberreiss and Mrs. N'Diaye took up duty in 1991 and Mrs. Kock in 1992. All three are objecting to the Organisation's refusal to convert their appointments on expiry into permanent ones.

2. Until a short while ago the Service Regulations of the European Patent Office provided solely for appointment of staff "for life", so to speak, under contracts without limit of time. The Organisation used to obtain any temporary staff it needed from employment agencies. Such arrangements having proved unsatisfactory, its Administrative Council decided in 1985 to consider making legal provision for recruiting staff directly under fixed-term contracts.

3. The outcome was a decision that the Administrative Council took on 17 January 1986 - No. CA/D 14/85 - to determine conditions of service for auxiliary staff. The preamble states that temporary contracts should be used only "to solve temporary problems". The first of the ensuing five paragraphs says that the total period of employment under such a contract may not exceed two years; the second, that auxiliary staff shall be paid according to the nature of their duties; and the third, that pay shall be subject to national income tax. The fourth is about leave. And the fifth, which has given rise to this case, says:

> "Conditions of employment shall otherwise be governed by the employment and social welfare legislation in force at the place of employment; this shall also apply to matters of recourse to the national courts."

4. Since there is dispute over the construction to be put on the fifth paragraph and since the three complainants' contracts, which are in German, refer to it, it is worth reproducing the text of it in the EPO's other two official languages:

> "Das Dienstverhältnis bestimmt sich im übrigen nach den am Dienstort geltenden nationalen arbeits- und sozialrechtlichen Bestimmungen; dies gilt auch für den Rechtsweg zu den nationalen Gerichten."
>
> "Les autres conditions d'emploi sont assujetties au droit national du travail et de la sécurité sociale en vigueur au lieu d'affectation; cela vaut également en cas de saisine des tribunaux nationaux."

5. The contracts of service that the President of the Office and the complainants signed draw on the standard terms of decision 14/85. They provide that the complainants are to serve at the EPO's sub-office in Berlin. Clause 9 matches the first part of the fifth paragraph of the Council's decision, the part about the applicable law, but not the second, which is about the right of appeal, though the second part does appear in the full text of the decision appended to each contract.

6. When the complainants' appointments expired the Organisation took the view that its contractual relations with them were at an end. They thereupon filed internal appeals which were in like terms and had the same gist. Under German law - they argued - their contracts of service might not be limited to two years, the clause to that effect was invalid and they were entitled to permanent appointments. So they claimed the grant of indefinite appointments as permanent employees of the Organisation with retroactive effect from the date of expiry of their contracts. And if - they concluded - the Organisation refused their claims, they wanted the President of the Office to treat them as internal appeals under Articles 106 and 108 of the Service Regulations.

7. The EPO did not answer Mr. Silberreiss and Mrs. N'Diaye, whose cases arose together, in the same way as it answered Mrs. Kock, whose case came up one year later. Its final position may be summed up as follows. In each contract there was entered the date at which the appointment was to end, and the Organisation had neither any reason to renew the contract nor any need to grant a permanent appointment. The time clause was valid: municipal law was irrelevant by virtue of the express exclusion of it in the contract. Since as auxiliary staff the complainants were not free to file internal appeals and the internal means of redress were therefore exhausted, direct appeal lies to the Tribunal.

8. While their internal appeals were going ahead the complainants filed suit against the EPO with the employment tribunal of first instance (Arbeitsgericht) of Berlin. Only the case of Mr. Silberreiss, which he filed on 30 November 1993, went through the German courts, whereas pending the

outcome of it there was a stay of proceedings in the cases brought by Mrs. Kock and Mrs. N'Diaye.

9. On 4 February 1994 the Organisation filed a reply with the employment tribunal. As the Tribunal understands it, the EPO's position in that reply was as follows: it claimed immunity as to the conditions of service that the complainants' contracts expressly exempted from national law, including the time clause, this Tribunal being recognised as competent in that respect.

10. In a ruling of 22 February 1994 the employment tribunal accepted that contention and declined to entertain the suit filed by Mr. Silberreiss. He then appealed to the appellate employment tribunal (Landesarbeitsgericht) of the State of Berlin. That tribunal upheld the ruling on 12 September 1994 on the grounds that - as paragraph 5 of decision 14/85, which it cited, made plain - "the relevant national law will be applicable and the national courts competent only insofar as the Administrative Council's decision contains no express provision" ("dass sowohl das materielle nationale Recht nur gelten als auch der Rechtsweg zu den nationalen Gerichten nur gegeben sein soll, soweit der Verwaltungsratsbeschluss nicht bereits eine Regelung enthält"); that municipal law on the matter of fixed-term contracts varied greatly from country to country; that the Administrative Council's decision did contain an express provision on that subject, which was the one at issue; and that the German courts therefore had no jurisdiction.

11. There were two sequels: on 29 December 1994 Mr. Silberreiss withdrew an appeal he had filed with the federal employment tribunal (Bundesarbeitsgericht), the court of last instance in matters of employment; and the two other complainants thereupon withdrew their applications from the tribunal of first instance.

12. Without waiting for the outcome of the German litigation Mr. Silberreiss filed his complaint on 25 February 1994, i.e. just after the tribunal of first instance had made its ruling; Mrs. N'Diaye filed on 10 March and Mrs. Kock on 9 June 1994. The receivability of the complaints as a whole is not at issue.

13. In their original and later submissions the complainants put forward many pleas which rest on German labour law and on the Organisation's own rules. The gist of their case is as follows:

(a) The jobs they were assigned under their contracts of service were to vary according to need and consisted in a whole range of auxiliary duties: messenger service, reception, storekeeping, distribution of equipment and putting through telephone calls. In their submission an administration will always need staff to perform such duties precisely because of their variety. So the wording of their contracts was inconsistent with the Organisation's need, cited in the preamble to decision 14/85, "to solve temporary problems". The time clause being unlawful, they are to be treated as permanent employees.

(b) The Organisation was deceitful. Before the employment tribunal of first instance of Berlin it advocated a broad interpretation of its own immunity so as to narrow the competence of the municipal courts. Yet when the complainants made their claims it refused them access to the internal appeal procedure. It showed the same bad faith in the preparatory work on decision 14/85: the text was tampered with in translation and for that reason its validity is dubious.

14. The Organisation submits that the complaints are irreceivable insofar as they claim damages failing reinstatement under permanent appointments. That, it says, was not one of their original claims. It has the following pleas on the merits:

(a) Since its Regulations provide only for "life" appointments it had to find some way of resorting to temporary recruitment, which would make for flexibility. The main purpose was to achieve greater efficiency and escape the constant risk of having a host of permanent employees who could not be got rid of. That was the whole point of decision 14/85.

(b) Each of the complainants wittingly consented to the conditions of service. Never could any of them have doubted but that the contract was limited in time and not to be extended. Once they had the benefit of temporary contracts they were not free to rely on the terms thereof to get round the requirements for access to permanent appointment with the Organisation.

(c) The litigation in Germany raised conflicts of law and of jurisdiction which the German courts resolved in the Tribunal's favour. Referring to Judgment 1311 (in re Guerra Ardiles) and the precedents cited therein, the Organisation submits that the Tribunal holds to the view that the law of the international civil service shall apply in the event of conflict with municipal law and in particular with the law of the host country.

The Tribunal's jurisdiction

15. The Tribunal will first take up the issue of jurisdiction that the parties raise. Its ruling hinges on the construction to be put on paragraph 5 of decision 14/85, which affords the basis for clause 9 of the contract of service. The decision is authoritative in the three official versions - English, French and German - that appear above. The EPO says that the German was the original in the preparatory work. But neither that nor the drafting of the complainants' contracts in German confers any greater authority on that version. In law there is but one decision, and the interpretation of it, which must be objective, must match its terms and purpose.

16. The parties and the German courts put stock in the words "im übrigen". In the English text the term is "otherwise" and it was "par ailleurs" in an early draft of the French but became "Les autres conditions d'emploi" in the final text. But what raises the difficulty is not so much those words as the different shades of meaning there may be between "Dienstverhältnis", "conditions of employment" and "conditions d'emploi": the German denotes the whole relationship of employment from start to finish whereas the terms in English and French may be taken to mean only access to employment.

17. It is the German term, the most pregnant and the only unambiguous one, that best conveys the purpose of the provision. The purpose is that the EPO's auxiliary staff shall be subject to municipal law in three matters - employment, social security and tax - and that the Organisation's own rules shall apply only to the extent that the decision actually states they shall, viz. as to grading, pay, leave and the limit of duration. All other components of the employment relationship are therefore subject to municipal law.

18. The renvoi to municipal law also resolves the issue of jurisdiction. Indeed decision 14/85 states that in any dispute over a term of employment that is governed by municipal law the municipal courts shall have jurisdiction. The issue is the lawfulness of the complainants' fixed-term appointments; it is one that the decision and their contracts of service expressly cover; and so the German courts correctly resolved the conflict of jurisdiction by declining to entertain the issue. Insofar as the Organisation may have been arguing otherwise in its somewhat obscure submissions to the German courts it was wrong in law.

19. The EPO is also mistaken about Judgment 1311: the Tribunal has never ruled out municipal law a priori. Although it is ordinarily and essentially competent in a context of international law, it may well have to heed some provisions of

municipal law where, as indeed in this case, there is renvoi to such law in a contract of service or in an organisation's rules. Precedent further has it that there may be reference to municipal law for the sake of comparison and so as to educe certain general principles of law that apply to the international civil service.

The receivability of the claim to damages

20. For two reasons the EPO fails in its preliminary objection to the complainants' claim to damages. For one thing, it may not refuse the complainants access to the appeal procedure on the grounds that they are "auxiliary" staff, yet say that they ought, in what, for all intents and purposes, amounted to preliminary appeal, to have demarcated the full ambit of any future litigation. The other reason is that, as the Organisation must realise, it is precisely in cases like this, about termination of employment, that the Tribunal may in any event itself award damages if it deems reinstatement impossible.

21. So the objection to receivability cannot be sustained whatever the ruling on the merits may be.

The merits

22. The complaints fail on the merits on both objective and subjective grounds.

23. However municipal law on the grant of fixed-term contracts may vary from country to country, the fact is that in the international civil service such contracts are common and the policy is seen as a proper and even necessary method of administration. So the EPO acted unimpeachably in resorting to fixed-term contracts to get auxiliary work done and so ease the undue rigidity of its staff structure. True, especially when there is not full employment, the decision not to renew a contract on expiry may cause hardship. But that is why, in keeping with precedent, the Tribunal will in each case look to the circumstances in which the decision not to renew or not to convert to permanent appointment may have come about.

24. One further point is worth stressing. The Organisation is free to make whatever use it wishes of the possibility of granting fixed-term contracts. The Tribunal will not interfere in the exercise of such discretion. So there is another issue that it will not entertain, namely whether, on account of the way the work was organised, the complainants' duties were permanent or temporary. Whether

duties are permanent or not will depend not just on the sort of work to be done but also on the organisation's own shifting requirements.

25. As for the subjective grounds, the complainants quite wittingly consented, as the EPO points out, to the contracts of service they were offered and were aware that, being for a fixed term, the contracts could not run beyond the period of two years they set. Nor may the complainants object *a posteriori* to an essential term of the contract, viz. its duration, in an attempt to have it converted to a permanent appointment. They have adduced not a jot of evidence to suggest that the Organisation acted in any but its own legitimate interests either when the contracts were made out or when they came to an end.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas E. Razafindralambo P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re HAMOUDA, KIGARABA (No. 5),
MJIDOU, RANAIVOSON (No. 2), SEBAKUNZI,
SUPRAPTO (No. 2) and TALLON (No. 2)

Judgment 1451

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed against the Universal Postal Union (UPU) by Mr. Ahmed Hamouda, Mr. Richard Kigaraba (No. 5), Mr. Abderrahmane Mjidou, Mr. Henri Ranaivoson (No. 2), Mr. Ngabo Sebakunzi, Mr. Martosuhardjo Suprapto (No. 2) and Mr. Renatus Tallon (No. 2) on 23 June 1994 and corrected on 16 August, the UPU's reply of 19 October, the complainants' rejoinder of 22 December 1994 and the Organisation's surrejoinder of 10 February 1994;

Considering the application to intervene filed by Mr. Tony Der Hovsépian on 29 November 1994 and the Union's observations thereon of 16 December 1994;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the case is about the lawfulness of amendments which the Management Board of the Provident Scheme of the Universal Postal Union made to Article 19, on the settlement of disputes, of the Regulations of the Scheme and that the parties claim:

The complainants:

1. The quashing of the Board's decision to amend Article 19 of the Regulations so as to (a) reduce to 30 days the time limit for internal appeal and (b) confer on the insurance tribunal of the Canton of Berne sole jurisdiction over disputes as prescribed by Swiss law;

2. the reinstatement of the old text of Article 19, which set a time limit of 60 days for internal appeal and conferred jurisdiction over disputes on this Tribunal;

3. costs.

The defendant:

The rejection of the complaint as irreceivable or, failing that, as devoid of merit.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 25 March 1994 the Deputy Director-General of the International Bureau of the Union, which is in Berne, issued an office notice, No. 35/1994. The notice informed the staff that the Management Board of the Union's Provident Scheme had decided to amend Article 19 of the Regulations of the Scheme, which was about the settlement of disputes. The effect was to remove from this Tribunal the jurisdiction which the UPU had recognised in a declaration of 25 May 1965 and to vest it in the insurance tribunal of the Canton of Berne. The amendment also reduced the time limit for internal appeal from 60 to 30 days. By a letter of 22 April 1994 to the secretary of the Scheme the complainants asked that the Board restore the old text of Article 19. In a letter of 20 May 1994 the deputy secretary of the Scheme refused on the grounds that their internal appeal was a "collective" action and, besides, challenged a decision to amend rules; it was therefore irreceivable. That is the decision they are impugning.

B. The complainants reject the Board's objections of 20 May 1994 to receivability. On the merits they point out that the Scheme has personality under international law and that appeal to an international jurisdiction is therefore an essential term of their employment. The impugned decision impairs their acquired rights and even puts their international status in jeopardy.

C. In its reply the UPU maintains that the complaint is irreceivable for the reasons the Management Board gave. It was the Swiss authorities that required that the insurance tribunal of the Canton of Berne should have jurisdiction. There is no breach of any acquired rights: the complainants may still appeal to an independent jurisdiction.

D. In their rejoinder the complainants maintain that their complaint is receivable and enlarge on their pleas.

E. In its surrejoinder the Union presses its pleas on receivability and on the merits.

CONSIDERATIONS:

1. The Universal Postal Union has its headquarters at Berne and employs the complainants. On 20 October 1992 the Management Board of its Provident Scheme amended Article 19 of the Scheme's Regulations. The Swiss Federal Social Insurance Office (OFAS) endorsed the decision on 2 November 1993 and the Executive Council of the UPU on 18 February 1994. Office notice 35/1994 of 25 March 1994 announced it to the staff. The complainants seek the quashing of the decision. They contend that the new text of Article 19 impairs in two ways the rights they used to have as to jurisdiction: first, by shortening the time limit for internal appeal from 60 to 30 days and, secondly, by removing jurisdiction from this Tribunal and vesting it instead in the insurance tribunal of the Canton of Berne.

2. The background to the decision under challenge may be summed up as follows. The Provident Scheme was set up as a foundation within the meaning of sections 80 and following of the Swiss Civil Code. The deeds were made out at Berne on 24 December 1963. The signatories were the Chairman of the Union's Executive Council, the Director of its International Bureau and a representative of the Swiss Federal Council, i.e. the Federal Government of Switzerland.

3. The deeds define the object and aims of the Provident Scheme and give details of its initial assets and its funding, which comes mainly from the UPU and its staff. Management is in the hands of a Board of three: the Chairman of the Executive Council, the Director of the Bureau and a member appointed by the staff. Under clause 7 of the deeds the Management Board makes the regulations subject to approval by the "supervisory authority" of the Scheme and the Council. Clause 8 declares the Swiss Federal Council to be the supervisory authority, and the evidence is that in practice the Federal Council acts as such through the OFAS.

4. The Management Board made the Regulations of the Scheme in accordance with clause 7 of the deeds. Article 19 of the Regulations, which is about the settlement of disputes, used to read:

> "1. A participant or any other person able to show that he is entitled to rights under these Regulations by virtue of the participation in the Provident Scheme of a staff member who considers that a decision of the Management Board is prejudicial to him may, within 60 days of its notification to him, submit a written request to the Board asking it to review the decision.
>
> 2. If the Management Board maintains its decision or takes no action on the request within 60 days, the member concerned may file a complaint with the Administrative Tribunal of the International Labour Organisation in accordance with the Statute of that Tribunal and with the declaration recognizing its jurisdiction."

5. The UPU accordingly refers to the "Regulations of the Provident Scheme" in the declaration it made on 25 May 1965 recognising this Tribunal's jurisdiction, which the Governing Body of the International Labour Office accepted on 19 November 1965.

6. By a letter of 25 July 1985 the Federal Ministry of Foreign Affairs of Switzerland informed the Union that since 1 January 1985 there had been a new section of the Swiss Civil Code - 89 bis(6) - on staff pension schemes. It asked the UPU to check that the Regulations of its Provident Scheme squared with the new section and to submit all necessary amendments to the OFAS.

7. The Management Board thereupon set up a working party to look into the matter. In its report of 11 February 1987 the working party concluded that, with slight adjustments, the Regulations were in keeping with the new section of the Civil Code. The one point of difficulty was section 73 of a Federal Act of 25 June 1982 - known as the "LPP" - on occupational old-age, survivors' and invalidity insurance. Section 73, to which 89 bis(6) refers, says that the cantonal insurance tribunal shall entertain any dispute and that appeal shall lie to the federal insurance tribunal. The working party was in favour of keeping the jurisdiction of this Tribunal and so recommended negotiating exemption from section 73 with the Swiss authorities.

8. The Executive Council agreed and at its ordinary session of 28 April 1987 the Management Board decided to negotiate with the Swiss. In a letter of 1 June 1987 the secretary of the Scheme told the OFAS that the UPU wanted this Tribunal to remain competent and was seeking exemption from section 73 for that purpose.

9. Despite several reminders by the Scheme the OFAS did not reply for over five years. In a letter of 7 October 1992

it refused exemption on the grounds that what section 73 said about jurisdiction was "compulsory", that the Scheme had been set up as a foundation under Swiss law, and that the Agreement concluded with the United Nations on 11 June and 1 July 1946 on the subject of privileges and immunities and later extended to the Union did not allow of such exemption. In sum, said the letter, jurisdiction must be removed from this Tribunal and the Scheme must bring its Regulations into line with Swiss law.

10. The Management Board accordingly resolved to amend Article 19 of the Regulations so as to confer jurisdiction on the insurance tribunal of the Canton of Berne instead. Since the supervisory authority had asked that proceedings be swifter the Board further decided to amend paragraph 1 of Article 19 to reduce the time limit for internal appeal from 60 to 30 days.

11. It is common ground that the amendments to Article 19 were made in line with the procedure that the deeds of the Scheme lay down in clause 7. They were as follows:

In paragraph 1 "60" was replaced with "30".

Paragraph 2 now reads:

> "If the Management Board maintains its decision or takes no action on the request, the matter may be referred to the insurance tribunal of the Canton of Berne in accordance with Section 73 of the Federal law on occupational old-age, survivors and invalidity insurance (LPP)".*

12. The amendments were announced in office notice 35/1994 of 25 March 1994, and on 22 April the complainants wrote in protest to the secretary of the Scheme. Their letter pointed out the drawbacks for staff of the tighter deadline for internal appeal and of the change in jurisdiction and asked the Board to reverse its decision and restore the old text of Article 19.

13. The deputy secretary of the Scheme refused in a letter of 20 May 1994 which he wrote on the Board's orders. His letter says that the Board regards the appeal as irreceivable on two counts:

being filed by several staff members and therefore a "collective" action, it is incompatible with the system of appeal, which provides only for individual appeal;

---

* Registry's translation.

> being a decision to amend rules, the impugned measure is not subject to review; the complainants fail to show how it offends against their individual rights and interests.

On the merits the letter says that, the Scheme being a private foundation under Swiss law, the Board may not object to the jurisdiction that is compulsory under that law and that neither the shorter time limit for internal appeal nor the rules of procedure of the competent Swiss jurisdiction create insuperable difficulties for UPU staff. The complainants filed this complaint on 23 June 1994 against the Board's refusal of their claims.

The pleas

14. The complainants' pleas may be summed up as follows. On receivability they point out that though Article 19(2) of the Regulations of the Scheme confers jurisdiction on the insurance tribunal of the Canton of Berne the Union has not withdrawn its recognition of the jurisdiction of the ILO Tribunal over matters relating to the Scheme. So staff may still appeal to this Tribunal against the removal from the rules of a safeguard which they see as an essential term of their employment. As for the Board's objection to receivability, the Staff Regulations do not forbid "collective" appeal and according to the Tribunal's case law a decision does not have to be individual for appeal to lie. They cite Judgments 626 (in re Giroud No. 3 and Caspari) and 669 (in re van Voorthuizen), both under 2.

15. On the merits the gist of the complainants' pleas is as follows:

(a) The amendments to Article 19 of the Regulations did not comply with the requirements of the founding deeds of the Scheme. According to clause 7 any amendment is subject to approval by the supervisory authority. Instead of putting the matter to the Swiss Federal Council the Management Board turned to a subordinate technical body, the OFAS, which may not rule on such matters of principle as the determination of the proper forum. Although the OFAS makes out that the jurisdiction of a cantonal tribunal is "compulsory" there is no guarantee that in the event of dispute that tribunal will declare itself competent: not only does the Scheme have personality under international law but the organisation of which it is the affiliate, the UPU, enjoys immunity of jurisdiction. The staff may eventually fall foul of a conflict in which both the municipal and international tribunals decline jurisdiction; they will then have no judicial safeguards whatever.

(b) The staff were not consulted about the amendments but were suddenly presented with a fait accompli on learning of them from office notice 35/1994.

(c) Although the Scheme is a foundation under Swiss law it is still inherently a person under international law. So an essential safeguard that the complainants derive from the terms of their employment is that an international tribunal should protect their rightful interests. Replacing this Tribunal with a municipal one impairs their acquired rights.

(d) In the context of the international civil service the shorter, thirty-day deadline for internal appeal and the many constraints of proceedings in municipal courts make it hard for staff to defend their rights properly and even harder for retired staff, who may be living anywhere in the world. Moreover, the cantonal tribunal has particular language requirements and litigants have to engage Swiss counsel.

16. The Union maintains that the complaint is irreceivable, though it offers no pleas beyond those the Management Board put forward in answer to the internal appeal. It warns of the danger of quashing a general measure on the application of individual officials on the grounds that the rights of other staff who want no change may suffer.

17. On the merits the Union has the following pleas:

(a) Retracing the history of its Provident Scheme, it contends that any international organisation is free to provide social security as it sees fit. When it set up its own Scheme it decided to have a foundation under Swiss law. In so doing it agreed to be subject to that law and to waive immunity of jurisdiction. One particular consequence was the acceptance of supervision by the OFAS as the competent Swiss authority. Being anxious not to forfeit the benefit of such supervision, it opted for the jurisdiction of the competent Swiss tribunal on realising that the new Swiss law made that compulsory and the Swiss would grant no exemption. But since the staff are not of one mind on the subject it has not yet removed jurisdiction over the Scheme from this Tribunal. So it may still resume negotiation with the Swiss to see whether it can keep both their supervision of the Scheme and the Tribunal's jurisdiction.

(b) The staff members' right to a hearing remains unimpaired: under clause 6 of the founding deeds one of the Board's three members must be appointed by the staff of the Bureau.

(c) As to the procedural requirements, the Union suggests that since the foundation is subject to Swiss law and since the deeds expressly put a Swiss body in charge of the supervision they require, it is only right that Swiss courts should hear any dispute. The complainants have no good reason to object to the shorter time limit for internal appeal: according to Staff Rule 111.3 the normal time limit for such appeal is thirty days.

Receivability

18. The Union's first objection is that the complaint is a "collective" one. What it says by way of explanation shows that it means thereby a suit filed in the general interests of the civil service by representatives of staff associations. In Judgment 1392 (in re Raths No. 2) - submits the Union - the Tribunal held under 18 and 24 that such a suit, of which the hallmark is action by staff associations or agents professing to represent them, does not form part of the system of individual appeal that the organisations which have recognised the Tribunal's jurisdiction commonly provide for in their rules and that the Tribunal's own Statute contemplates. The Tribunal need not revert to that case law since this is not such a complaint. It has been filed by several officials with the commendable aim of making the proceedings simpler, and each of them is defending his own individual interests, even though they are the same as the others'. The objection fails.

19. More difficult is the Union's objection that the impugned decision makes amendments to the Regulations and is therefore a general one about the tenor of rules. As was said in Judgment 1393 (in re Cook), under 6 to 8, the Tribunal has often ruled on the issue, especially for the purpose of determining when the time limit starts for appeal. It has held that where a general decision gives rise to decisions affecting individuals the time limit is set off only on notification to the official of an individual decision that affects him. Moreover, as was held in Judgment 1000 (in re Clements, Patak and Rödl), under 12, the employee may, when impugning an individual decision that touches him directly, "challenge the lawfulness of any general or prior decision ... that affords the basis for the individual one". In sum, the staff member need not ordinarily impugn at once a general decision he believes has caused him injury but may, without any risk of being time-barred, wait until the general decision affects him in the form of an individual one.

20. But that is not how things stand in this case. The impugned decision is not of a kind that need give rise to implementing provisions, save in unforeseeable circumstances and in an unforeseeable future. The new wording of Article 19 strikes out of the terms of employment _ipso facto_ the safeguard of international judicial review and vests jurisdiction in

municipal courts instead. The amendment brings about an immediate and almost irreversible change in the system of appeal. So whatever the merits of such change - an issue taken up below - every staff member has an actual and present interest in having light shed on the matter. The Tribunal affords guarantees of a system of international law within the bounds of its competence: see Judgments 1265 (in re Berlioz and others), under 24, and 1328 (in re Bluske No. 3), under 13. It would therefore be wrong to deny the staff the right of appeal on the grounds that the impugned decision is general in purport.

21. Next comes the Union's plea that to quash a general decision on an application from a few might damage the interests of others who wanted it to remain in force. The plea is certainly material since on the evidence the staff of the UPU seem to disagree about the amendment to Article 19. But the Tribunal is satisfied that when a decision has been challenged, albeit by only a few, it has a duty to rule in full objectivity and as soon as possible. The Union itself has well defended the interests of those who want to keep the decision, and they themselves may do so by filing applications to intervene. The conclusion from the foregoing is that in the circumstances this objection too must fail.

The merits

22. It is clear from the parties' submissions that the main issue is the Scheme's legal status: on that will hinge the Tribunal's rulings, first on the Union's successive decisions about jurisdiction over disputes, and then on two sets of issues: the procedure for putting into effect the amendments to the Regulations, and the change in jurisdiction that the new text of Article 19 has brought about.

23. The Tribunal concurs fully with what the Union says about the legal process it chose to follow in setting up its Provident Scheme. It is true that other such schemes have been set up under international law and that the Tribunal has generally preferred that any dispute it may hear be resolved by the rules of the international civil service. But it has also been at pains to except any case in which there is express *renvoi* to municipal law in an organisation's rules or in the terms of appointment: for recent examples see Judgments 1311 (in re Guerra Ardiles) and 1369 (in re Decarnière No. 2 and Verlinden Nos. 1 and 2), both under 15.

24. So there is no reason why the UPU should not have chosen to set up its Scheme as a foundation under Swiss private law and to make the Swiss Federal Council both a signatory of the founding deeds and the supervisory authority. By making that option in law the Union perforce agreed to vest jurisdiction in the Swiss courts insofar as they have it under the

substantive rules of Swiss law on foundations. So the Act that made new rules on foundations did not bring in any new jurisdiction. It merely vested jurisdiction in the Swiss insurance tribunals that hear disputes involving foundations of a certain kind, namely pension funds. There can therefore be no objection to the new Swiss legislation as such or to the Union's accepting the consequences thereof.

25. Yet the Scheme does also have close enough links with international law to warrant vesting jurisdiction at the same time in an international tribunal. Its basis in law and the funding of it are international, and coverage by it is one of the terms of contracts of service that are subject to international law. Moreover, if a judgment goes against the Scheme there will arise the question of execution by the Union as the guarantor of its obligations: waiver of the UPU's immunity does not necessarily mean surrender of its financial autonomy. That being so, the Union was right originally to extend recognition of this Tribunal's jurisdiction to the Scheme, without detriment to the concurrent jurisdiction of municipal courts that was due to the Scheme's status under Swiss private law.

26. The legal option of making the Scheme a Swiss foundation and the later recognition of this Tribunal's jurisdiction inevitably created a latent conflict between the Tribunal and the competent Swiss courts. And the conflict became apparent when Switzerland conferred jurisdiction over social insurance foundations on special tribunals and the supervisory authority demanded the removal of the Tribunal's jurisdiction.

27. The upshot is that in this case there are close enough connections with both municipal and international law to warrant recognition of both jurisdictions, each for different issues. A staff member may therefore go to whatever tribunal he deems competent, and any tribunal with which suit is filed will determine whether the material issues of the particular case make it the most suitable jurisdiction. Such is the universally acknowledged doctrine of the forum conveniens: see the United States Supreme Court, Gulf Oil Corporation v. Gilbert, 330 US 501, 1947; the House of Lords, Spiliada Maritime Corporation v. Cansulex Ltd., 1987, AC 460; Bundesgerichtshof, 2 July 1991, BGHZ 115, 90; Paul Lagarde, Le principe de proximité dans le droit international privé contemporain, Recueil des Cours, Academy of International Law, 196, 1986, pages 9-238 and in particular 127-168; James Fawcett, Declining Jurisdiction in Private International Law, Reports to the XIVth Congress of the International Academy of Comparative Law, Athens and Delphi, 1994, Oxford University Press, 1995.

28. The following conclusions may be drawn from the above considerations of comparative law. Jurisdiction is conferred

where there are significant connections with a particular forum; recourse to a specific system of law is one such connection; there may be more than one forum which has jurisdiction; the connections are to be assessed against the interests of both parties to the litigation and against the public interest as well; and any conflict of jurisdiction must invariably be so resolved as to allow no judicial void where conflicting jurisdictions decline competence.

29. In the light of the foregoing the amendments to the Regulations cannot stand. They rest on a fundamentally wrong assessment by the Management Board and the Executive Council of the situation that arose as a result of the Scheme's status as a foundation under Swiss civil law and of the later recognition of this Tribunal's jurisdiction.

30. Another point must be made clear. The reinstatement of the status quo by the quashing of the impugned decision restores a situation which is quite consistent with the requirement of rational division of jurisdiction in the international context. Each of the jurisdictions that may be competent - the cantonal insurance tribunal and this Tribunal - will be able to determine its own competence according to the material rules on conflict. That was what the Tribunal held in Judgment 1258 (in re Griebl-Zink) on a case in which there was similar conflict of jurisdiction: it said under 4 that it was for each court to rule on its own competence. But if the Union wanted to resolve the conflict of jurisdiction in some other way in agreement with the Swiss authorities it would have to do so by concluding a proper international agreement binding on both jurisdictions.

31. The last issue is the time limit for internal appeal. On that score the Tribunal holds that the authors of the challenged amendment were wrong to think that reducing still further a time limit that was already fairly short could somehow serve to hasten the proceedings. This amendment too, like the main one, must be set aside because there are no credible grounds for it.

32. The conclusion is that the decision amending Article 19 of the Regulations of the Provident Scheme must be set aside in its entirety.

33. Since the complainants have succeeded in their main claim they are entitled, as they ask, to an award of costs, and the amount is set at 7,000 Swiss francs.

34. Mr. Der Hovsépian's application to intervene is allowed. He shall have the same entitlements as the complainants, save as to costs.

DECISION:

For the above reasons,

1. The decision of 20 October 1992 amending Article 19 of the Regulations of the UPU's Provident Scheme is set aside and the parties' rights and obligations shall be determined accordingly.
2. The Union shall pay the complainants a total of 7,000 Swiss francs in costs.
3. The application to intervene is allowed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re WASSEF (No. 3) Judgment 1452

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 10 August 1994, the FAO's reply of 29 September, the complainant's rejoinder of 26 October and the Organization's surrejoinder of 2 December 1994;

Considering Article II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out, under A, in Judgment 1401. The FAO employed the complainant under several fixed-term appointments. In 1991 it sent him out to N'Djamena, in Chad, as an administrative officer at grade P.3. Since he had hepatitis B the Organization had him removed on 23 August 1993 to Paris, where he was treated until September 1993. On account of his illness the Organization extended his contract, which was to expire on 30 September 1993, until 7 January 1994, but did not renew it thereafter.

On 7 January and 15 February 1994 he submitted two appeals to the Director-General alleging that his illness was service-incurred; on 3 March he lodged a third appeal, against the decision not to renew his contract.

In a fax dated 21 February he had asked the Director of the Personnel Division to give him the names of officials on the "Panel of Counsel" who might, in keeping with section 331 of the FAO Manual, act for staff in appeal proceedings.

By a fax of 3 March the Director answered that there was no list yet of staff members available for the Panel but he could have any staff member put his case to the Appeals Committee.

By a letter of 14 March he appealed to the Director-General claiming 2 million United States dollars in damages for injury he imputed to the fax of 3 March. On 16 April he lodged an appeal with the Appeals Committee.

On 3 May 1994 the Assistant Director-General in charge of Administration and Finance wrote to him on the Director-General's behalf rejecting, among other things, the claim in his letter of 14 March to damages.

B. The complainant submits that the internal remedies open to an FAO official are unsatisfactory because the Appeals Committee never finds in the official's favour, at least not formally, and cannot enforce its recommendations.

Referring to Annex B to section 331 of the FAO Manual, he says that the Panel of Counsel is an important feature of the internal appeal procedure. By refusing to provide it the FAO impaired his right to due process.

It also infringed its own rules and Article VII of the Tribunal's Statute by failing to reply to his claim of 14 March within the 30-day time limit in Manual section 303.1312.

He asks the Tribunal to declare the Director-General's reply of 3 May 1994 "irreceivable and non-existent" and to award him $2 million in damages, $1,500 to meet office expenses and "up to" $12,000 to cover "lawyer's fees, if any".

C. In its reply the FAO argues that the complainant is not challenging a final decision. He has failed to exhaust the available internal means of appeal, as he must under Manual section 332.222 and Article VII(1) of the Tribunal's Statute. He may not rely on VII(3), which applies only when the Administration fails to take a decision. Since he has put his case to the Tribunal before the Appeals Committee has reported on his claims his complaint is premature.

D. The complainant rejoins that internal remedies in the FAO are "null and void".

E. In its surrejoinder the Organization presses its pleas.

CONSIDERATIONS:

1. On 14 March 1994 the complainant despatched a letter by registered post to the Director-General of the FAO. The letter objected to the Organization's failure to comply with

provisions in its Manual about setting up a Panel of Counsel and to denial of his rights, and he claimed payment of 2 million dollars in damages.

2. Having received no reply to his letter, he drew up an internal appeal dated 16 April 1994 raising the same objections and seeking the same relief. He was free to do so under Staff Rule 303.1313, the Director-General having failed to reply to his claim within the time limit in Rule 303.1312, which was "30 days from the date on which the letter ... was despatched". He posted his appeal to the Appeals Committee on 26 April 1994.

3. It was by a letter dated 3 May that the Assistant Director-General in charge of Administration and Finance replied on the Director-General's behalf rejecting the claim in the complainant's letter of 14 March.

4. The Organization's statement in reply to his internal appeal was lodged with the Appeals Committee on 4 July. By a letter dated 5 July the secretary of the Committee forwarded to him a copy of that statement. The letter said that since he had already said he would not be submitting any counter-statement the date for hearing his appeal would be "established as soon as possible". The Appeals Committee was in recess from 22 July to 15 August.

5. The complainant lodged this complaint on 10 August 1994, and the decision he identifies as the one he is impugning is the rejection of his claims that he says he infers under Article VII(3) of the Tribunal's Statute.

6. The complainant has come to the Tribunal without waiting for the completion of the internal appeal procedure and for the final decision by the Director-General that will result therefrom. He has therefore failed to exhaust the means of internal appeal and there is no final decision yet for him to impugn. Article VII(3) does not apply. His complaint fails because it is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas

Michel Gentot

Mella Carroll

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

SEVENTY-NINTH SESSION

In re WASSEF (No. 4) Judgment 1453

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 18 August 1994, the FAO's reply of 29 September, the complainant's rejoinder of 26 October and the Organization's surrejoinder of 2 December 1994;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear, under A, in Judgment 1401 and in Judgment 1452, which is also delivered this day.

By a letter of 30 November 1993 the complainant asked the Director of the Administrative Services Division to put him on a continuing post at grade P.4 at headquarters on the grounds that the Assistant Director of the Division had offered him such a post when they had met on 5 October 1992. By a memorandum of 10 December 1993 the Director acknowledged receipt of his letter.

On 11 January 1994 he appealed to the Director-General pressing his claim to a continuing post at grade P.4. By a letter of 8 March the Director of the Personnel Division told him that the Administration had never offered him any such post.

On 6 April he appealed once more to the Director-General claiming 8,000,001 United States dollars in damages for "libel and defamation" in the letter of 8 March. On 11 May he lodged an appeal with the Appeals Committee.

B. The complainant puts forward again all the arguments he offered in support of his third complaint about the FAO's internal appeal procedure: see Judgment 1452 under B.

He maintains that as early as 1979 the Administration offered him a continuing post at headquarters and confirmed its offer in 1984, 1988 and 1992. He gives an account of his meeting with the Assistant Director of the Administrative Services Division on 5 October 1992 and submits that the Assistant Director then made him a promise.

He invites the Tribunal to award him 8,000,001 dollars in damages, $2,200 to meet office expenses and "up to" $14,000 to cover "lawyer's fees, if any".

C. In its reply the FAO contends that his complaint is irreceivable because he is not impugning a final decision. He has failed to observe the requirement in Article VII(1) of the Tribunal's Statute and in FAO Manual section 332.222 that he exhaust the internal means of appeal before going to the Tribunal. Article VII(3) applies only where the Administration has failed to take any decision and so affords no grounds for appeal. Since he has put his case to the Tribunal before the Appeals Committee has reported on his claims his complaint is premature.

D. In his rejoinder the complainant contends that the staff of the FAO are victims of a "monumental swindle". He presses his claim to damages for defamation.

E. In its surrejoinder the Organization presses its pleas.

CONSIDERATIONS:

1. On 7 April 1994 the complainant despatched a letter dated 6 April by registered post to the Director-General of the Organization. The letter claimed payment of $8,000,001 in damages on the grounds of "libel and defamation" in a letter which the Director of the Personnel Division had written to him on 8 March 1994.

2. By a letter of 3 May the Assistant Director-General in charge of Administration and Finance replied on the Director-General's behalf rejecting the complainant's allegations of libel and defamation and his claim to damages. He lodged an appeal dated 11 May 1994 against that decision and delivered it to the Appeals Committee by hand on 12 May.

3. The Organization's statement in reply to his internal appeal was lodged with the Appeals Committee on 27 June. By a

letter dated 28 June the secretary of the Committee forwarded to him a copy of that statement. The letter said that since he had already said he would not be submitting any counter-statement the date for hearing his appeal would be "established as soon as possible". The Appeals Committee was in recess from 22 July to 15 August.

4. The complainant lodged this complaint on 18 August 1994, and the decision he identifies as the one he is impugning is the rejection of his claims that he says he infers under Article VII(3) of the Tribunal's Statute.

5. The complainant has come to the Tribunal without waiting for the completion of the internal appeal procedure and for the final decision of the Director-General that will result therefrom. He has therefore failed to exhaust the means of internal appeal and there is no final decision yet for him to impugn. Article VII(3) does not apply. His complaint fails because it is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas

Michel Gentot

Mella Carroll

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-NINTH SESSION

In re WASSEF (No. 5) Judgment 1454

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 24 August 1994, the FAO's reply of 14 October and the complainant's letters of 22 December 1994 and 23 January 1995 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are summed up, under A, in Judgment 1401 and in Judgments 1452 and 1453 also delivered this day.

In a letter dated 30 November 1993 the complainant asked the Director of the Administrative Services Division to put him on a continuing post at grade P.4 at headquarters on the grounds that the Assistant Director of the Division had offered him such a post when they had met on 5 October 1992. In a memorandum of 10 December 1993 the Director acknowledged receipt of his letter.

By a letter dated 8 March 1994 the Director of the Personnel Division told him that the Administration had never offered him such a post.

On 11 May he appealed to the Director-General for a final decision on his assignment to a continuing post, and failing that, claimed an award of damages. By a letter of 24 June the Deputy Director-General rejected his claims on the Director-General's behalf, adding that the decision was not final.

On 27 July 1994 the complainant appealed to the Organization's Appeals Committee.

B. The complainant restates the pleas he put forward in his fourth complaint. He maintains that the Assistant Director of the Administrative Services Division offered him a continuing post at headquarters when they met on 5 October 1992. The Administration failed to keep its promise and acted in breach of good faith.

The letter of 24 June 1994 was "illegal" because the Director-General failed to answer his claims within the time limit set in the rules.

He asks the Tribunal to award him 2,500,000 United States dollars in damages if the FAO fails to transfer him to a continuing post at grade P.4 three months "before" the date of the judgment, and $2,200 to meet office expenses and "up to" $14,000 to cover "lawyer's fees, if any".

C. In its reply the FAO pleads that the complainant is not impugning a final decision. He has not satisfied the requirement in Article VII(1) of the Tribunal's Statute and FAO Manual section 332.222 that he exhaust the internal remedies open to him before going to the Tribunal. Since Article VII(3) applies only where the Administration has failed to take any decision it affords him no grounds for appeal. Since he has put his case to the Tribunal before the Appeals Committee has reported on his claims his complaint is premature.

CONSIDERATIONS:

1. On 12 May 1994 the complainant despatched a letter dated 11 May by registered post to the Director-General of the Organization. The letter claimed a final decision on his assignment to a continuing P.4 post at headquarters or else an award of damages.

2. The Deputy Director-General replied on the Director-General's behalf in a letter dated 24 June 1994 rejecting his claims. The letter pointed out that if he wished to appeal to the Appeals Committee he might do so within sixty days from the date of receipt and that the decision was not a final one.

3. According to Staff Rule 303.1312 the time limit for a reply by the Director-General to such claims is ninety days "if the staff member has requested the Director-General" - as the complainant did - "to render a final decision". The Director-General therefore observed the time limit in this case.

4. On 27 July the complainant lodged with the Appeals Committee an appeal in which he repeated his claims. He lodged this complaint with the Tribunal on 24 August 1994, and the decision he is challenging is the rejection of his claims that he infers under Article VII(3) of the Tribunal's Statute.

5. The complainant has come to the Tribunal before he has exhausted the means of internal appeal and obtained the Director-General's final decision. Article VII(3) does not apply. His complaint must be dismissed as irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Michel Gentot

Mella Carroll
Mella Carroll

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner
A.B. Gardner

SEVENTY-NINTH SESSION

In re WASSEF (No. 6) **Judgment 1455**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 19 November 1994, the FAO's reply of 29 December 1994 and the complainant's letters of 18 January and 21 February 1995 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Disputes that the complainant has with the FAO are recounted, under A, in Judgment 1401 and in Judgments 1452, 1453 and 1454 also delivered this day.

On 2 September 1994 he appealed to the Director-General alleging, among other things, that the Administration and the Appeals Committee had failed to comply with the rules on internal appeal.

On 27 October 1994 the Deputy Director-General replied that since his appeal did not challenge any decision it was irreceivable.

B. The complainant puts forward once again the arguments he made in earlier complaints and in particular his allegations that the FAO's appeals procedure is unlawful and its staff are being swindled.

He asks the Tribunal to declare the internal appeal procedure "null and void"; award him 3 million United States dollars in damages under several heads of injury; treat the award of such damages as a duty inherent in "international loyalty to the whole United Nations family of organizations"; and grant him $1,500 in costs.

C. In its reply the FAO submits that his complaint is irreceivable because he is not impugning a final decision. He has failed to observe the requirement in Article VII(1) of the Tribunal's Statute and in FAO Manual section 332.222 that the internal means of redress be exhausted. Since Article VII(3) applies only where the Administration fails to take a decision it affords him no grounds for appeal.

CONSIDERATIONS:

1. On 2 September 1994 the complainant sent a letter of appeal to the Director-General of the Organization by fax and a copy of it by registered post. The letter asked for a final decision on allegations by him of failure by the Administration and the FAO Appeals Committee to observe the material rules, breach of Article VII of the Tribunal's Statute and denial of his "rights and entitlements for invoking the Conciliation Procedures and ... for proposals re improvements in the internal redress procedure".

2. The Deputy Director-General replied on the Director-General's behalf in a letter dated 27 October 1994, which the complainant received on 5 November, rejecting his appeal and refusing his request for a final decision. The letter said that if he wished to appeal to the Appeals Committee he might do so within sixty days from the date of receipt and that the decision was not a final one.

3. The complainant made no such appeal to the Appeals Committee but instead lodged this complaint with the Tribunal on 19 November 1994.

4. The inference to be drawn from the way in which he puts his case is that he is assuming the failure to take a final decision within sixty days of his letter of 2 September 1994 to be rejection of his claims under Article VII(3) of the Tribunal's Statute. That provision reads:

> "Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration."

5. For its part the Organization relies on Article VII(1), which provides:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

6. As the Tribunal has declared, for example in Judgment 532 (in re Devisme) under 3, Article VII(3) cannot be looked at in isolation:

> "To infer a decision to dismiss where no final decision has been taken within the sixty days would greatly broaden the scope of Article VII(3), particularly when the organisation's rules establish an appeal body but do not set time limits for its reports. In such case Article VII(3), which is presumably to be treated as covering the exception, would in fact become the rule. Moreover, to broaden the scope of paragraph 3 would unduly restrict that of paragraph 1, which requires the complainant to exhaust the internal means of redress."

7. According to FAO Staff Rule 303.1312 the time limit for reply to a letter of appeal is ninety days "if the staff member has requested the Director-General to render a final decision". Moreover, Rule 303.1313 says:

> "If staff members wish to appeal against the reply received from the Director-General, other than a reply constituting a final decision, or if no reply is received within the applicable time limit referred to in Staff Rule 303.1312, they may submit an appeal, in a Memorandum of Appeal, to the Chairman of the Appeals Committee ..."

In this case the Deputy Director-General's reply to the complainant's letter of 2 September 1994 was dated 27 October 1994 and it was therefore within the time limit. But the complainant failed to submit an appeal to the Appeals Committee under Rule 303.1313. He has therefore failed to exhaust the internal means of redress and there is no final decision for him to impugn. Article VII(3) does not apply. His complaint fails because it is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Michel Gentot

Mella Carroll
Mella Carroll

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner
A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

**Registry's translation,
the French text alone
being authoritative.**

SEVENTY-NINTH SESSION

In re BELSER, BOSSUNG, LEDERER, RIEWALD, SARRE, STREBEL and ZIMMER

Judgment 1456

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paulus Belser against the European Patent Organisation (EPO) on 11 August 1994 and corrected on 12 September, the EPO's reply of 5 December 1994, the complainant's rejoinder of 10 March 1995 and the Organisation's surrejoinder of 21 April 1995;

Considering the complaint filed by Mr. Klaus Sarre against the same Organisation on 14 September 1994, the EPO's reply of 6 December 1994, the complainant's rejoinder of 10 March 1995 and the Organisation's surrejoinder of 28 April 1995;

Considering the complaint filed by Mr. Wolfgang Riewald against the Organisation on 12 August 1994, the EPO's reply of 6 December 1994, the complainant's rejoinder of 11 March 1995 and the Organisation's surrejoinder of 26 April 1995;

Considering the complaint filed by Mr. Kurt Lederer against the Organisation on 21 September 1994, the EPO's reply of 22 December 1994, the complainant's rejoinder of 20 January 1995 and the Organisation's surrejoinder of 17 March 1995;

Considering the complaint filed by Mr. Otto Bossung against the Organisation on 27 September 1994 and corrected on 12 October, the EPO's reply of 22 December 1994, the complainant's rejoinder of 22 March 1995 and the Organisation's surrejoinder of 21 April 1995;

Considering the complaint filed by Mr. Johann Strebel against the Organisation on 28 September 1994, the EPO's reply of 15 December 1994, the complainant's rejoinder of 21 January 1995 and the Organisation's surrejoinder of 17 March 1995;

Considering the complaint filed by Mr. Steffen Zimmer against the Organisation on 4 October 1994, the EPO's reply of 20 December 1994, the complainant's rejoinder of 15 March 1995 and the Organisation's surrejoinder of 25 April 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the case turns on whether to count the complainants' prior employment in the civil service of the Federal Republic of Germany towards the years of service reckonable for the purpose of determining pension and that the parties' claims are that the Tribunal:

The complainants:

1. Quash decisions by the President of the European Patent Office, the secretariat of the EPO, apply the "retrospective insurance value" (Nachversicherungswert) established by the German national administration for the purpose of "enhancement of benefit" under Article 46 of the EPO Pension Scheme Regulations.
2. order the President of the Office to apply, in reckoning the enhancement of their benefits, values corresponding to the full entitlements that the complainants acquired under the pension scheme to which they previously belonged;
3. order the Organisation to pay the difference between the enhanced benefits actually paid to the complainants since retirement and the recalculated amounts, plus interest at the rate of 10 per cent a year;
4. award costs.

The defendant:

1. Dismiss as irreceivable the complaints of Mr. Belser, Mr. Bossung, Mr. Lederer, Mr. Riewald and Mr. Strebel on the grounds that their internal appeals were out of time;
2. dismiss the other complainants' claims on the merits.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants, who are German citizens, all joined the European Patent Office with sponsorship from the German national administration for which they had worked for several years. They retired at various dates from July 1991 until November 1993.

Under Article 12 of the EPO Pension Scheme Regulations an employee who enters the EPO's service may arrange for transfer to the Organisation of sums corresponding to the liquidation of entitlements accrued under any pension scheme to which the employee previously belonged. Article 46 of the Regulations says that where the previous pension scheme does not allow such transfer the employee is entitled to "enhancement" of benefit. According to Rule 46.1/1 of the Implementing Rules the enhancement depends on the sum supplied by the institution responsible for the previous scheme.

At dates ranging from July 1991 until October 1993 the EPO told each of the complainants the amount of the enhancement he was entitled to. It explained that the amount depended on the "retrospective insurance value" provided by the German administration.

At dates from August 1992 until November 1993 the complainants each filed an internal appeal against the EPO's method of reckoning the enhancement. In a single report of 31 May 1994 the Appeals Committee recommended rejecting the appeals. By decisions of 6 and 7 July 1994 the Director of Staff Policy informed the complainants that the President of the Office had endorsed the recommendation. Those are the decisions under challenge.

B. The complainants submit that the values supplied by the German administration are wrong because they fail to take full account of their entitlements under the previous pension scheme. They ask the EPO to take other values in reckoning the enhancement of their benefits under Article 46 of the Pension Scheme Regulations.

C. In its replies the Organisation submits that the complaints of Mr. Belser, Mr. Bossung, Mr. Lederer, Mr. Riewald and Mr. Strebel are irreceivable because they lodged their internal appeals out of time. It pleads that all the complaints are devoid of merit on the grounds that it cannot but apply the values provided by the board of the previous scheme.

D. In their rejoinders the complainants maintain that their complaints are receivable and that the Organisation has misapplied the rules.

E. In its surrejoinders the Organisation presses its pleas.

CONSIDERATIONS:

1. For those who have joined the staff of the EPO under sponsorship by a national administration and whose previous pension scheme does not allow transfer of pension entitlements Article 46 of the EPO Pension Scheme Regulations allows "enhancement" of benefit. The complainants used to be employees of the EPO. In internal appeals they challenged the Organisation's reckoning of the enhancement of their benefits under Article 46. They want the Tribunal to quash decisions the President of the Office took, on 6 and 7 July 1994, to reject those appeals. They object to his applying what is known as the "retrospective insurance value" (Nachversicherungswert) in reckoning enhancement. That is the value certified by the German administration and accepted by the EPO in accordance with rule 46.1/1 i) of the Rules Implementing the Pension Scheme Regulations. The complainants are each asking that it be replaced by a value which more accurately reflects the pension rights they acquired under the German pension scheme before joining the EPO.

2. The complainants all used to be civil servants or judges of the German patent administration. At the time when it was set up the EPO recruited them under sponsorship by that administration to carry out like duties. The pension scheme of the German civil service being wholly funded from its budget, they were unable to have their pension entitlements transferred on taking up duty with the EPO. But they did keep those entitlements, which depended on length of service at the date of leaving for the EPO. The upshot was that their pensions could not be worked out before the dates at which they actually retired and which ranged from July 1991 to November 1993. Since they were not with the EPO for as long as with the German administration there arose dispute between them and the EPO as to whether the figures the administration had supplied for the purpose of reckoning the enhancement of benefit under Article 46 of the Pension Regulations and the implementing rules truly represented their prior entitlements.

3. They lodged internal appeals. The Appeals Committee heard the complainants and went carefully into their individual claims and the common issues. In its report of 31 May 1994 it unanimously recommended treating all the appeals as receivable, despite the EPO's objections to some, but rejecting them on the merits.

4. In view of the Appeals Committee's report on those appeals the Tribunal need take up only the substantive issues in the light of the material rules set out below and the parties' pleas.

The material rules and the parties' pleas

5. Article 12(1) of the Pension Scheme Regulations, which is headed "Inward and outward transfer of pension rights", reads:

> "An employee who enters the service of the Office after leaving the service of a government department, a national organisation, an international organisation ... or a firm, may arrange for payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under his previous pension scheme, provided that that scheme allows such transfers to be made.
>
> In such cases the Office shall determine, by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service with which he shall be credited under its own pension scheme."

6. Article 43, which comes under "Transitional Provisions", provides:

> "Articles 44, 45 and 46 shall apply to employees who enter the service of the Office at the proposal of a national administration and who have completed at least five years' service with a government department, a national organisation, an international organisation ... or a firm."

7. Article 46, on "Enhancement of benefits", stipulates:

> "(1) An employee referred to in Article 43 whose previous pension scheme does not permit transfers under Article 12, paragraph 1, or who has not availed himself of the option to make such a transfer shall be entitled to an addition based on:
>
> > i) the difference between the rate of salary applicable for the grade and step reached at the date of departure or death and the rate of salary current for his starting grade and step in the Office at that date, and
> >
> > ii) the number of years of service that would have been credited under Article 12, paragraph 1, if a transfer payment had been made. ...
>
> (2) The increase in pension shall be 2% of the difference in salaries established under paragraph 1 multiplied by the number of years so determined. ..."

8. Lastly, Rule 46.1/1 of the Implementing Rules has the following to say about reckoning the "number of years of service" referred to in 46(1)ii):

> "i) The number of years of service in question shall be calculated on the basis of the amount of a theoretical transfer calculated in accordance with the conditions laid down in Article 12, paragraph 1. The afore-mentioned amount shall be that which the department or institution responsible for administering the previous pension scheme is able to certify as being the actuarial equivalent or any other fixed value representing retirement pension rights acquired under that scheme before departure. Pension rights acquired by means of voluntary contributions shall be disregarded.
>
> ii) Where the institution responsible for administering the previous pension scheme is unable to provide such a certified statement, the Office shall determine in each case the number of years of service which it will take into account."

9. The evidence is that for former employees of the German administration, who belonged to a pension scheme wholly funded from its budget, it proved impossible to work out any actuarial equivalent of entitlements. At all events the German administration maintained that for want of provision for such equivalents under German law it could not work out the figures that the EPO Pension Regulations demanded. The only value it was willing to give the Organisation was not the actuarial equivalent but another "fixed value representing retirement pension rights" within the meaning of Rule 46.1/1. That was the "Nachversicherungswert", or "retrospective insurance value". It is a lump sum that the German administration makes over to any employee who leaves for some reason or other and who moves to the statutory scheme of staff pension insurance. Both sides accept that it is much lower than the actuarial equivalent of the civil servant's pension entitlements. So it was that figure, as certified by the German administration, that the EPO used to work out the amount of the "theoretical transfer" under Rule 46.1/1 and the enhancement of benefit under Article 46 of the Regulations.

10. In the complainants' submission that method of reckoning rests on a mistaken analogy and the resulting figures do not truly represent "pension rights acquired" under the German pension scheme. To their mind the Organisation failed in its duty of care by unreservedly endorsing the figures certified by the German administration. Since those figures bear no relation to the true value of their accrued rights the Organisation should have discarded them and should itself have reckoned the

"fixed value representing" their pension rights in accordance with 46.1/1 i). By applying the certified figures the EPO was unfair to them and adopted a policy that discriminates between officials according to the social security scheme they belonged to before joining the Organisation. As a first step towards obtaining accurate figures they ask the Tribunal to quash the impugned decisions on the grounds that they rest on unreserved endorsement of the German administration's figures. But apart from Mr. Belser none of them says what a more accurate figure might be.

11. Since the figure came from the German administration Mr. Belser filed suit against the competent authority, the Federal Ministry of Justice, with the administrative tribunal of Bavaria (Bayerisches Verwaltungsgericht) in Munich. That tribunal having on 14 December 1993 declared the case irreceivable, he appealed to the appellate administrative tribunal of Bavaria (Bayerischer Verwaltungsgerichtshof), which on 21 December 1994 declared the case receivable but devoid of merit. Although the ruling gave leave for appeal there is no evidence to show whether Mr. Belser has taken the case to the federal administrative tribunal (Bundesverwaltungsgericht). He has been at pains to submit with his complaint the reckoning of an actuarial equivalent which he had an insurance company carry out.

12. The Organisation submits that according to Rule 46.1/1 the "department or institution responsible for administering the previous pension scheme" works out the value of pension rights and the figure of the "theoretical transfer". So the Organisation believes it has no choice but to endorse the figures that the German administration supplied at its sovereign discretion.

13. On the merits it contends that the "retrospective insurance value" affords a fair basis of reckoning since it is the amount that someone who previously belonged to the general security scheme in Germany might actually have had transferred to the EPO. It is only right to take the same figure in working out the amount of the merely theoretical transfer for the purpose of enhancement of benefit. There is, too, a problem of fairness that such enhancement raises in the sharing out of benefits. Whereas enhancement is denied to the rest of the EPO staff - the great majority - who may have transferred their prior entitlements to the Organisation and, on top, are helping to finance its social security scheme by contributing to the pension fund, the complainants are keeping their German pensions intact but still getting the enhancement, at no charge to themselves, and having the cost borne in full by the Organisation in accordance with its Pension Scheme Regulations.

The receivability of the complaints and of certain evidence

14. The first issue is the receivability of the complaints. The Appeals Committee duly entertained the EPO's objections on that score. It held that since some of the internal appeals were undoubtedly receivable, and since they were all connected, there was no point in drawing a distinction on account of the internal time bar. In view of what follows there is now no point in taking up the issue.

15. In their pleadings the parties cite two judgments of the Court of Justice of the European Communities. One is a judgment of 18 March 1982, Caisse de pensions des Employés privés v. Léon Bodson, ECR p. 1019; the other is one of 17 December 1987, Commission v. the Grand-Duchy of Luxembourg, ECR p. 5391. They further rely on the text of an agreement on social security concluded between Germany and the European Communities on 9 October 1992. But neither the agreement nor the judgments are material to the Tribunal's ruling on this case. The agreement is not binding on the EPO. And the judgments are about the distinction that the rules of the Communities draw between "actuarial equivalent" and "sums repaid" and are irrelevant because this case is about the undefined notion in the Organisation's rules of "any other fixed value" representing retirement pension rights. That notion is not at all akin to that of "sums repaid", which refers to the total of paid-up contributions. This case turns solely on the Organisation's own rules.

16. The Tribunal will also disregard the documents produced by the parties on the preparatory work for the material rules. The documents are fragmentary, and indeed the Appeals Committee even remarked that it had been refused access to the ones that really mattered, namely those which related to preparatory work on Rule 46.1/1. The Organisation makes no bones about the deep disagreement between national delegations over the drafting of the rules that have prompted this case. So the scant information in the preparatory papers is unlikely to prove helpful. In construing the rules the Tribunal is bound to take an objective view and pay heed, in line with the method approved in international law, to their wording, context, purport and purpose.

The merits

17. The material rules being obscure, the first issue is to determine their true purpose. That means, to be precise, construing the term "enhancement" in Article 46 of the Pension Scheme Regulations, which corresponds to no recognised notion

of social security law. In this context the purpose of enhancement is to bestow a special pension benefit on employees whom the EPO has recruited under sponsorship by a national administration. According to Article 43 that benefit accrues to anyone so recruited who completed at least five years' service with a "government department", a "national organisation", an "international organisation" or a "firm". What enhancement really means is that the EPO retroactively increases the pension entitlements that accrued to its employee before recruitment.

18. One point worth noting is that Article 46(1)i) does not apply the enhancement to the pension as a whole but only to the difference between two rates of salary: the rate corresponding to the grade and step reached by virtue of promotion and seniority by the date of the employee's departure from the EPO and the current rate corresponding to the starting grade and step at the same date. According to Rule 46.1/1 of the Implementing Rules the enhancement is reckoned on the basis of "theoretical transfer" to the Organisation of an "actuarial equivalent" or, failing that, of "any other fixed value". In either contingency the employee is certain to be paid the national pension in full and to get the enhancement on top. The enhancement depends on the number of years of employment in the national administration but is financially linked by means of a fictitious calculation to the international pension, the cost of it being borne by the Organisation. In sum, the prior career in the national administration is reconstituted, but at the Organisation's expense.

19. Rule 46.1/1 lays down the method of determining reckonable years of service. It says under i) that the basis for reckoning the number of years of service to be taken into account for the purposes of Article 46(1)ii) of the Pension Scheme Regulations is the "amount of a theoretical transfer" calculated as prescribed in Article 12(1). In other words, according to the first sentence of 12(1), the basis for determining reckonable years of service to establish the amount of the enhancement is the notional equivalent, for each beneficiary, of the "amounts corresponding to the retirement pension rights accrued under his previous pension scheme". According to the second sentence of 46.1/1 i) the amount of the theoretical transfer "shall be that which the department or institution responsible for administering the previous pension scheme is able to certify as being the actuarial equivalent or any other fixed value representing retirement pension rights acquired under that scheme before departure".

20. On that score there are two points at issue between the parties. What exactly is meant by "any other fixed value" as against the actuarial equivalent? And is the figure certified by the national administration binding on the Organisation?

21. As to the first point, the second sentence of 46.1/1 i) confers no discretion on the EPO. The wording establishes a logical sequence between "actuarial equivalent" and "any other fixed value" in that the Organisation may resort to the latter, undefined, notion only if the determination of an actuarial equivalent proves impossible.

22. The evidence shows that ever since the first case arose in 1983 the German administration has declined to certify any actuarial value on the grounds that there is no provision for it in German law. The Organisation does not demur. It has since 1984 been accepting as another "fixed value" within the meaning of 46.1/1 i) the "retrospective insurance value", which German law defines as the figure taken into account when a civil servant moves to the general pension insurance scheme. All the correspondence submitted to the Tribunal shows that that has been the notion governing EPO practice since the outset.

23. The practice is not compatible with the premisses underlying the EPO's rules, which are no less binding on its member States and their administrations than on the EPO's own institutions. The point is that the first sentence of Rule 46.1/1 i) refers not to any actual transfer of money, which would indeed offend against the cardinal principle of a wholly budgetary scheme, but to "theoretical transfer", i.e. a merely notional calculation. The Organisation needs to have such calculation made for its own purposes, and there are no financial consequences whatever for the body that makes the calculation by reference to the data at its disposal. That interpretation is borne out by the wording of the alternative in Rule 46.1/1, a fixed value "representing retirement pension rights acquired". The term denotes another theoretical value, one to be reckoned on the strength of the employee's full record of social security coverage.

24. As to the decision-making process - on which turn the means of redress - the Organisation postulates that 46.1/1 i) left it with no choice but to take the figures certified by the German administration. Consequently it declines liability for those figures and even urges the complainants to see whether the German authorities will change their mind. The complainants retort that the EPO is free to discard the figures supplied by a national administration if they are not to its liking and that where agreement proves impossible it has a duty to determine the number of reckonable years of service at it own discretion in accordance with 46.1/1 ii).

25. Here the complainants' argument does have some merit. No doubt national institutions that run pension schemes are better able to evaluate entitlements that may have accrued to the employee under one or more national schemes before

recruitment by the EPO. No doubt, too, the phrase "the aforementioned amount shall be that which" the national institution is able to certify, means that the institution has the last word on the figure to be used. But despite the authority thus conferred on the national institution the Organisation remains free by virtue of its administrative and financial autonomy to discard any figure that the institution has worked out on some basis that offends against the prescriptions of the international regulations. It is free, too, to ask the institution to work out a new figure in the event of disagreement. And if the institution cannot certify a figure that meets the requirements of the EPO's rules the Organisation still has Rule 46.1/1 ii) to fall back on.

26. The conclusion is that by taking the German administration's figures the Organisation endorsed them and subsumed them in its own decision. The figures thus become inseparable from the decision for the purpose of any litigation in the municipal courts; the EPO may not properly refer the complainants to the national administration; and that administration may not properly intervene in the Organisation's decision.

27. As to the purpose of the enhancement and their plea that it is discriminatory, the complainants argue that they are entitled to the full value of their pension entitlements and that the Organisation may not reduce the figure to a purely nominal amount on the strength of an immaterial provision of municiple law. The Organisation replies that the purpose of enhancement was to attract experienced staff from national patent offices when it was being set up.

28. That is the only explanation the Organisation gives, and the Tribunal does not find it plausible. The proper way of achieving the Organisation's purpose was to offer applicants conditions of service that took account of their prior experience, for example a higher starting grade. The terms on which the enhancement is granted do not square with the Organisation's professed aim. Under Article 43 the enhancement is granted on the completion of at least five years' service, a stint obviously too short to afford the experience the EPO was looking for. Enhancement is due only to someone who cannot, or who has chosen not to, have pension entitlements transferred to the Organisation, i.e. someone who has kept national pension entitlements in their entirety and who may not therefore claim the increase in the name of social justice.

29. Lastly, the enhancement does make for inadmissible discrimination, though not of the kind the complainants have in mind. Article 43 says that enhancement is due only to someone who has sponsorship by a national administration, and it cites arbitrarily defined categories, not the criterion of professional experience that the EPO is relying on. Such method of

granting the enhancement constitutes an inadmissible form of encroachment by national administrations in the area of the EPO's autonomy and works to the detriment of employees whom it did not recruit under sponsorship from any such administration.

30. What the complainants want is that by quashing the impugned decisions the Tribunal express disapproval of the use of the "retrospective insurance value" in reckoning the enhancement and so get the Organisation to negotiate with the German authorities theoretical figures that more truly represent all their accrued rights. But they offer no specific suggestions as to how to achieve that end.

31. The Tribunal disallows their claims for two reasons. First, it may not order the Organisation to negotiate with a member State or set the objectives of any such negotiation. Secondly, the foregoing shows that the theoretical figures used in reckoning the enhancement are exceedingly unreliable, and they are a source of difficulty in achieving a distribution of benefits that is fair to the other members of the staff. The Tribunal cannot therefore contemplate any possibility of enlargement of a benefit which is inherently so unsound.

32. In the circumstances the complaints must fail, there being no need to rule on the Organisation's plea that some of them are irreceivable.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re DI PALMA, MOSSAZ and ZOTIN

Judgment 1457

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Salvatore Di Palma, Mr. Bernard Mossaz and Mr. Sergei Zotin against the World Intellectual Property Organization (WIPO) on 17 December 1993;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the second paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a final brief;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear in Judgment 1417 under 1 and 2. The complainants belong to the Professional category of staff of WIPO. According to WIPO Staff Regulation 3.5(a) base salaries of staff of the Organization in the Professional and higher categories are "adjusted" to variations in the cost of living at Geneva. That is done by reference to a "post adjustment index" and by payment to the staff of a non-pensionable allowance known as "post adjustment". The index for Geneva serves as a measure of the cost of living there as against New York, the duty station that the common system of the United Nations takes for the sake of comparison.

Regulation 3.5(e) reads:

> "The multiplier applied for calculating the post adjustment shall be that established for Geneva by the

> International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

To calculate the post adjustment index, of which "rental/housing" costs are a main component, the Commission carries out periodic surveys into the cost of living at duty stations in the common system of United Nations organisations. Subtracting 100 from the post adjustment index gives the figure known as the "multiplier", which is multiplied by 1 per cent of base salary to yield the amount of the post adjustment allowance.

By circular 18/1991 of 11 March 1991 the Organization announced the multiplier which it was applying to pay as from January 1991.

A letter dated 30 April 1992 from the Controller and Director of the Budget and Finance Division of WIPO to the Chairman of the Commission referred to errors in "the implementation of the methodology" of the "place-to-place survey" which the Commission had carried out in May 1990. The letter said that had the methodology been properly followed the so-called "Walsh index", which is a gauge of prices at various duty stations, would have gone up by 0.5 per cent. It asked the Chairman to review the matter so that the Organization might make "the necessary corrections" in the pay of the Professional and higher categories of its staff.

In a reply dated 1 June 1992 the Chairman said that he saw no grounds for any such corrections.

On 14 September 1992 the Director of the Personnel Division sent staff in the Professional and higher categories a memorandum in answer to queries about pay. He observed that the post adjustment index for Geneva was "some 0.2% higher than it should have been to ensure parity of purchasing power between Geneva and New York" and that the Director General had refrained from taking any administrative decision on the grounds that "the results of the 1990 place-to-place survey as regards [the post adjustment index] for Geneva were not reflected in the post adjustment multiplier until ... July 1991".

By letters of 26 October 1992 the complainants submitted to the Director General under Rule 11.1.1(b)(1) requests for review of the decision to apply the multiplier announced on 11 March 1991 to their pay for January of that year. They alleged that on the strength of the 1990 place-to-place survey a higher multiplier should have been applied as from September 1990.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the chairman of the Appeal Board in letters dated 14 January 1993.

In its report of 21 July 1993 the Board recommended rejecting their appeals. The Director General having taken no further decisions, the complainants are impugning the rejection which they infer under Article VII(3) of the Tribunal's Statute.

B. The complainants challenge the lawfulness of the multiplier that was applied to their pay for January 1991. They have three main pleas.

The first is breach of patere legem quam ipse fecisti. The applicable methodology set at six the minimum desirable number of price quotations to be obtained for each item that was used in determining the consumer price index, and no item for which there were fewer than three quotations was to count. But the Commission counted three items for which it had only one or two quotations. The three were a cane chair, a man's short-sleeved cotton shirt and a short-wave radio. There was also a breach of procedure in that the Commission failed to report "background information" on those three items to its Advisory Committee on Post Adjustment Questions (ACPAQ).

The complainants' second plea is that the place-to-place survey done in May 1990 shows the "fundamental flaws" they pointed out in their letters of 26 October 1992 to the Director General. One example is the arbitrary way in which the Commission simply assumed that the prices of motor cars were the same at all duty stations and so miscalculated the cost of car ownership. The complainants allege that the prices of eight models of car were on the average 68.2 per cent higher in Geneva than in New York in 1990. Since prices are so much lower in the United States than in Switzerland there was flagrant discrimination against staff stationed in Geneva.

Thirdly, they accuse the Commission of "gross negligence" on the grounds that members of its secretariat had a "vested interest" in showing their "approach" to be "correct". The Commission is preoccupied with policy in the United Nations to the detriment of the common system at large.

The complainants seek the quashing of the decisions setting their pay according to the results of the place-to-place survey done in May 1990 as from "the month found by the Tribunal to be the relevant month". They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year, and awards of 3,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO cites Regulation 3.19(a), which gives staff members two years in which to claim any payment due under the Staff Regulations or Rules. The complainants' challenges to their pay for any of the months from October 1990 to September 1992 are in the defendant's view receivable.

On the merits the Organization submits that it had nothing to do with the Commission's choice of the method of determining the multiplier: that was a matter for the Commission alone. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder of 10 May 1994 the complainants contend that WIPO is yet again in breach of its duty, stated in Judgment 1265 (in re Berlioz and others), to see that any "elements of the common system or any other outside system" which it puts in its own rules are lawful. At least one other organisation that belongs to the common system has refused to apply a multiplier which it thought flawed.

E. The Commission sent WIPO on 13 May 1994 a letter and observations which the Organization filed on its behalf on 13 June. Commenting on issues the complainants raised in their letters of 26 October 1992 to the Director General about "methodology", the Commission maintains that it carried out the survey in 1990 in compliance with the methodology it had itself "approved" and "reported" to the General Assembly after "close cooperation and consultation" with representatives of the organisations and staff associations in the common system.

F. In their further submissions of 14 July 1994 the complainants contend that the Commission has ignored their whole complaint by confining comment to their letters of 26 October 1992 to the Director General. Failing to address the substance of their pleas tacitly acknowledges that they are right.

The complainants claim further amounts in costs.

G. Further observations which the Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 14 July 1994.

H. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission says that it had the "full co-operation" of staff representatives in doing the survey in 1990. None of them raised any "objective objections" [sic] to the methodology at the time. Any discrepancy there may have been was tiny and due to the exercise of discretion: the survey procedure, being complex, could not be followed in "absolute conformity" with unbending rules. The best approach is to resort to the "consultative process", which enables the Commission to take account of objections. Only "fundamental conceptual flaws" should be challengeable, not "minor" details.

The Commission raises a procedural objection. Citing its own Statute and Rules of Procedure, it observes that they provide in elaborate detail for the participation of organisations and staff and that the staff representatives of WIPO may address it in writing or orally. So it -

> "... behooves staff members who are not satisfied with some aspect of the work of the Commission ... to cause their staff representatives, and possibly the executive head of the employing organization, to raise these points with the Commission in a timely and formal manner ... so that they might be considered before definitive decisions are taken by the Commission. ..."

In this case the complainants failed to do so.

I. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants point out that "independent experts" did not take part - as they ought to have done - at all stages of the survey. The collection of data on prices in New York was "grossly unprofessional". The Commission's plea that any discrepancy was small and a matter of discretion concedes its mistakes, for which the complainants press their claim to redress.

They seek yet further amounts in costs.

CONSIDERATIONS:

1. The complainants are challenging the amount of their pay for January 1991. They object to the reckoning insofar as it was affected by what is known as the "in-area component" of the post adjustment index for Geneva as determined on the strength of the "place-to-place survey" which the International Civil Service Commission carried out in May 1990.

2. The post adjustment allowance is payable to staff in the Professional and higher categories in the common system of the United Nations, to which the complainants' employer, the World Intellectual Property Organization, belongs. It is paid over and above base salary. Its purpose is to ensure that the take-home pay of such staff has the same purchasing power in all duty stations. New York at present serves as the standard of comparison for the system of post adjustment. If the cost of living at any other duty station is found to be lower than at New York, no downward adjustment is made to base salary.

3. The system of post adjustment has been revised in each decade since the establishment of the United Nations. A thorough review in 1989 of the conditions of service of staff in the Professional and higher categories led to broad reforms that were intended to streamline the process of making surveys of the cost of living and make the whole system more open.

4. In May 1994 the International Civil Service Commission published a guide entitled The post adjustment system: what it is, how it works. The guide explains that the reckoning of post adjustment will depend on:

(1) any differences in prices between New York and the other duty station;

(2) the rate of any inflation in the cost of living at that duty station; and

(3) the rate of exchange between the United States dollar and the currency of the country of the duty station.

The post adjustment index is established by means of periodic place-to-place surveys, which compare the cost of living in New York and at other duty stations. It is also adjusted from time to time in between surveys. Its main components are:

(1) the "in-area component", which relates to living costs incurred in the country of the duty station;

(2) the "rental/housing component"; and

(3) the "out-of-area component", reflecting expenses which, though incurred while the staff member is at the duty station, are met outside the country of the duty station and generally in the currency of another country.

5. The guide further explains that the in-area component, the one at issue in this case, is calculated from a "basket" of goods and services. The "basket" contains some 240 representative items. They include food, clothing, maintaining a household, means of transport, education, recreation, health and personal care. Data on the prices of the items at the duty station are collected and compared with data on the prices of the same items in New York. The "ratios" of the prices in the two cities are then - says the guide - "combined to produce a total in-area index that excludes housing, the latter element comprising a separate component of the index".

6. The second component - "rental/housing" - accounts for much of expenditure by staff at many duty stations. As the guide explains, over and above "the basic cost of dwelling" "housing costs include utility costs". Data on such costs are obtained directly from staff. Rents are compared between the duty station and New York for "dwellings of equivalent

characteristics". The cost of "home ownership (i.e. mortgage/ interest charges)" is discounted.

7. Thirdly, the "out-of-area component" is included in recognition of the fact that staff spend part of their pay outside the country of their duty station. Such expenditure includes items that they import directly "because of limitations of the local market", private travel on home leave and on holidays, the education and support of dependants abroad and the upkeep of a dwelling in the home country. Information on such expenditure and on the proportion it bears to total expenditure is obtained by asking the staff to fill up questionnaires in the context of the place-to-place surveys. The component is adjusted from time to time by the application of a "global factor known as the out-of-area price index" which - says the guide - "derives from the international character of common system staff: no particular country can be designated as the focal point for expenditures incurred outside the duty station". To classify out-of-area expenditure duty stations are divided into groups. For "headquarters and other duty stations with similar characteristics", which are known as "Group I duty stations", the Commission has established a 10 per cent out-of-area weighting. Geneva, where WIPO has its headquarters, belongs to Group I.

8. The post adjustment index for a duty station is the measure of the cost of living of staff there as against New York at a specific date. The post adjustment is expressed in the form of a "multiplier" for each duty station. The multiplier is the figure of the post adjustment index minus 100: for example, the post adjustment index figure of 110 yields a multiplier of 10. The multiplier is applied to 1 per cent of net base annual salary, which is divided by 12 to give the monthly figure of post adjustment for each grade and step. That amount is added to the base monthly salary.

9. As to the "methodology" of place-to-place surveys the Commission decided* at its 28th Session, in July 1988:

> "As much as possible, the rules of the post adjustment system should be followed by the secretariat [of the Commission]. In exceptional circumstances some judgment would have to be exercised and flexible interpretations arrived at. In these cases, the secretariat should make recommendations to the Chairman of ICSC for exceptions. All such exceptions should be reported to ACPAQ [the Commission's Advisory Committee on Post Adjustment Questions] with background information."

---

* ICSC/28/R.15, paragraph 38(f).

The Commission* further decided at its 32nd Session, in July 1990 -

> "... to reconfirm the existing guidelines of six price quotations per item as the desirable minimum number. Items with two or less price quotations should be excluded from the comparison for index calculation. Such prices should be treated following procedures already approved by the Commission on the recommendation of ACPAQ."

10. Citing those guidelines on the methodology, the complainants plead breach of patere legem. They point out that in the survey which the Commission made in 1990 there were three items for which "two or less" - or, to put it another way, fewer than three - quotations had been obtained. At New York there were two such items: a man's short-sleeved pure cotton shirt, for which there had been only two quotations, and a cane chair, for which there was only one. At Geneva there was a third item: a short-wave radio (Sony model ICF-7601), for which only two quotations had been found. The complainants reckon that if those three items had been discounted the post adjustment index for Geneva would have been higher; so the determination of their pay for January 1991 by application of the wrong multiplier was flawed. They argue that the Commission's decision at its 32nd Session, in July 1990, superseded the one it had taken at its 28th Session, in July 1988, and barred any flexibility in including items for which fewer than three quotations had been obtained. They further contend that the three items had not been reported on, with the required "background information", to ACPAQ.

11. In its reply the Organization stated that it and its Director General "neither affirm nor deny the information contained, or the statements set forth, or the allegations made by the complainants" and suggested that any additional information or commentary on the methodology involved or on the decisions challenged or any views on the merits of the complaint would have to come from the Commission. Judgment 1417 accordingly invited the Commission to file further submissions and the parties to file final briefs.

12. In its latest brief the Commission replies that the organisations and bodies representing the staff of the common system selected two independent observers who took part at all phases of the surveys made in 1990 of the cost of living at six duty stations, including Geneva, and of the data on prices in

---

* ICSC/32/R.24, paragraph 15(g).

New York. Their report dated 22 October 1990 to ACPAQ said* in paragraph 8:

> "Having followed the various teams of ICSC the observers noted differences in their approach with regard to the choice of articles to be priced. That having been said, the observers acknowledge that the ICSC price collectors carried out their work conscientiously and with integrity and followed the item specifications carefully. They refused to collect prices for items which did not correspond to the specifications nor did they generally take prices for substitute articles without noting the substitution with its characteristics of quality, size, composition, etc."

None of the observers' ensuing comments was about any of the items for which there had been fewer than three price quotations. The observers concluded in paragraphs 14 and 15:

> "It must be recognized that it is impossible to carry out surveys of this nature without mistakes occurring in the price collection phase, nor to avoid personal judgement in the choice of items too vaguely specified.
>
> Considering that the ICSC price collectors performed their work conscientiously, it could be assumed that the differences in approach and possible mistakes more or less balance each other out."

13. In his letter of 30 April 1992 to the Chairman of the Commission the Controller and Director of the Budget and Finance Division of WIPO asked for revision of elements of the survey carried out in Geneva in May 1990. In a memorandum of 1 June 1992 to the Executive Secretary of the Commission the Chief of the Cost-of-Living Division of the Commission's secretariat commented on the Controller's letter. He referred to the Commission's decision of July 1988, set out in 9 above, and then said:

> "Hence, ACPAQ guidelines, even when approved by ICSC, should be looked at as general rules, subject to exceptions, and not as fixed and immutable laws. By no means, cane chair and men's short sleeve shirts in New York and Sony radio in Geneva can be considered as 'uncommon and exotic items'. They just were not found in most selected shops at the time of the price collection."

He went on:

> "... the price collection of every item was 'observed' by two and sometimes three experts chosen by representatives

---

* ICSC/ACPAQ/S-1/CRP.4.

> of local organizations and staff of headquarters duty stations. After that, two high level experts from Geneva came to New York, closely followed the processing of the data and checked every detail of prices collected in New York. They had access to all of the material and received copies of same. When the exercise was completed, summary tables with average, minimum and maximum prices were prepared; number of quotations collected and used, for each item, were sent to the coordinator of the survey at each duty station to be shared with organizations and staff representatives. The same information was provided to members of ACPAQ. Finally the survey was 'dissected' by the members of ACPAQ jointly with representatives of organizations and staff, during the first special session of the Committee in New York."

14. The report dated 2 November 1990 on that session,* which ACPAQ held in October 1990, said in paragraph 65:

> "The Committee noted that the survey had been carried out according to the existing rules. ..."

15. Lastly, according to the report** dated 17 January 1991 on its third special session, in November 1990 -

> "The Commission decided that:
>
> (a) The price collection exercises and the surveys of household expenditures, including the surveys of housing and domestic service costs of staff members, had been properly carried out. ..."

16. It is plain on the evidence that when ACPAQ took up the findings of the survey for Geneva at its first special session, in October 1990, it had before it all the background information, including the numbers of price quotations. It nevertheless concluded that the approved methodology had been properly applied. It was on its recommendation that the Commission endorsed the whole exercise of the collection of data and approved the results of the survey. So the material issue in this case is whether the methodology that the Commission approved in 1990 as to the "desirable minimum number" of price quotations to be obtained for each item is inflexible or still admits the degree of flexibility that the Commission allowed for by its decision of July 1988.

---

* ICSC/ACPAQ/S-1/R.11.

** ICSC/S-3/R.3, paragraph 17.

17. The Tribunal is satisfied that the decision of July 1988 is a general one which still holds good and applied to the survey of the cost of living in Geneva that was made in May 1990. Since the "basket" consisted of 240 items, the three anomalies that the complainants rely on were of minimal importance and it was well within the discretion of the Commission to let them pass. It did so on the recommendation of ACPAQ, which had had the benefit of all the required background information and the report of the observers jointly appointed by organisations and staff. The conclusion is that the survey was not in breach of the methodology.

18. The complainants put forward the further plea that the methodology was fundamentally flawed in that it could not serve its intended purpose, was arbitrary and discriminated against staff at Geneva. They object, for example, to the exclusion of the costs of car ownership. But in this context they do not point to any breach of the methodology. Again, the Tribunal is satisfied that the decisions the Commission took were within the limits of the discretion it enjoys in applying the methodology. It is entitled to adopt its own methodology and is not bound to follow any suggestions from WIPO's working group on professional remuneration.

19. The complainants' plea of gross negligence in carrying out the survey of the cost of living in New York is not supported by the evidence.

20. Nor is their allegation that the Commission has a vested interest in achieving the highest possible figure for the cost of living in New York. Indeed the complainants themselves admit that "in the absence of any evidence, a claim to a general behaviour and to decisions driven by self-interest cannot be made".

21. In its latest brief the Commission raises a procedural objection set out under H above. But since the complaint fails on the merits, there is no need to entertain that objection.

DECISIONS:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

SEVENTY-NINTH SESSION

In re DAMOND, PAUTASSO and ROYLES — **Judgment 1458**

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Andrée Damond, Mr. Marco Pautasso and Mr. Malcolm Royles against the World Intellectual Property Organization (WIPO) on 17 December 1993;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the first paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a final brief;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear in Judgment 1417 under 1 and 2. The complainants belong to the Professional category of staff of WIPO. According to WIPO Staff Regulation 3.5(a) base salaries of staff of the Organization in the Professional and higher categories are "adjusted" to variations in the cost of living at Geneva. That is done by reference to a "post adjustment index" and by payment to the staff of a non-pensionable allowance known as "post adjustment". The index for Geneva serves as a measure of the cost of living there as against New York, the duty station that the common system of the United Nations takes for the sake of comparison.

Regulation 3.5(e) reads:

> "The multiplier applied for calculating the post adjustment shall be that established for Geneva by the

> International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

To calculate the post adjustment index, of which "rental/housing" costs are a main component, the Commission carries out periodic surveys into the cost of living at duty stations in the common system of United Nations organisations. Subtracting 100 from the post adjustment index gives the figure known as the "multiplier" which is multiplied by 1 per cent of base salary to yield the amount of the post adjustment allowance.

By circular 49/1991 of 2 July 1991 the Organization announced that the multiplier for July 1991 would be 78. Circular 58/1991 of 29 July explained that the new multiplier took into account changes in the index of consumer prices at Geneva since 1 July 1990, "the date of the last adjustment in Professional remuneration in Geneva".

A letter dated 30 April 1992 from the Controller and Director of the Budget and Finance Division of WIPO to the Chairman of the Commission observed that the post adjustment index for July 1991 failed to take account of increases in rents and in housing costs at Geneva. It asked the Chairman to review the matter so that the Organization might make "the necessary corrections" in the pay of the Professional and higher categories of its staff.

In a reply dated 1 June 1992 the Chairman said that he saw no grounds for revising the index.

On 14 September 1992 the Director of the Personnel Division sent staff in the Professional and higher categories a memorandum in answer to queries about pay. As to the reckoning of the increase in housing costs to determine the figures for July 1991, he explained that the Commission relied on a "monthly projection factor" based on surveys among staff of the common system; between May 1990, the date of the previous survey, and March 1991 the factor had risen by 2 per cent and the multiplier for July 1991 had reflected that.

By letters of 26 October 1992 the complainants submitted to the Director General under Rule 11.1.1(b)(1) requests for review of the decision to apply the multiplier for July 1991. They claimed an increase of 1.2 per cent in pay for that month and proportionate increases for any later months in which the multiplier might not "correctly reflect the value of the housing component". They asked the Director General, if he refused, to relieve them of the obligation to go to the Appeal Board.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the chairman of the Appeal Board on 12 January 1993.

In its report of 21 July 1993 the Board recommended rejecting their appeals. The Director General having taken no further decisions, the complainants are impugning the rejection which they infer under Article VII(3) of the Tribunal's Statute.

B. The complainants submit that the post adjustment index for July 1991 is unlawful. They have four main pleas.

The first is breach of patere legem quam ipse facisti. On 21 December 1990 the General Assembly of the United Nations approved a methodology which the Commission had proposed and which required (1) place-to-place comparison of housing costs, (2) assessment of housing costs based not on net but on gross rent or, in the case of home-owners, imputed gross rent and (3) "time-to-time adjustment" of the housing component of the post adjustment index using such "external data" as type of neighbourhood, distance from work and size of dwelling. But the Commission failed to apply its own methodology.

The complainants' second plea is that the method the Commission followed was on its own admission "inequitable" and "imprecise". The General Assembly acknowledged as much by calling on the Commission "as a matter of urgency ... to improve the measurement of the housing element in the remuneration package". But the Commission held to its old methods, which underestimated actual housing costs.

Thirdly, they allege breach of equal treatment. The Commission has a duty under the Noblemaire principle* to see that pay at different duty stations has uniform purchasing power. Though it took account of the housing component of the consumer price index for New York, it did not do so for Geneva. Geneva reported a rise of 8.3 per cent in rents over the material period and on that account the post adjustment index for July 1991 should have been 1.2 per cent higher.

Lastly, the complainants plead neglect of an essential fact. The "monthly projection factor" rested on the results of a housing survey for 1988 which were flawed mainly because of the low rate of response - a mere 12 per cent - to the questionnaire. Worse still, the Commission's projection of net rents from the 1988 and 1990 surveys to July 1991 was "linear". So it overlooked the steep increase in mortgage rates which pushed up rents in Geneva by 8.3 per cent between May 1990 and May 1991 after a rise of only 4.8 per cent between May 1988 and May 1989.

---

*For an explanation of this principle, see Judgment 825 (in re Beattie and Sheeran) under 1 to 5.

The complainants seek the quashing of the decisions setting their pay for July 1991 and any months thereafter. They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year, and awards of 3,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO concedes that the complaint is receivable under Regulation 3.19(a), which gives staff two years in which to claim any payment due under the Staff Regulations or Rules.

On the merits the Organization submits that it had nothing to do with the Commission's choice of the method of determining the multiplier: that was a matter for the Commission alone. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder of 10 May 1994 the complainants contend that WIPO is yet again in breach of its duty, stated in Judgment 1265 (in re Berlioz and others), to see that any "elements of the common system or any other outside system" which it puts in its own rules are lawful. At least one other organisation that belongs to the common system has refused to apply a multiplier which it thought flawed.

E. The Commission sent WIPO on 13 May 1994 a letter and observations which the Organization filed on its behalf on 13 June. Commenting on issues the complainants raised in their letters of 26 October 1992 to the Director General about "methodology", the Commission acknowledges the value of data from outside sources but observes that no deadline was set for "the implementation of external data", which it was "always recognized" would take a long time. Although the Commission has used the rent component of the consumer price indices at New York and Washington D.C. it was not bound to do so elsewhere; its decision to use the component of the Geneva index took effect only as from August 1993. As to the response to its questionnaire about housing, an "accurate calculation" would have required replies from staff stationed at Geneva but living just over the Swiss border, in France; but such staff did not fill up the questionnaire. One reason for the "discrepancy" between the rate of inflation at Geneva and the steep rise in mortgage rates there is that mortgage rates affect new rents more than older ones; so it takes time for them to push up the consumer price index.

F. In their further submissions of 14 July 1994 the complainants contend that the Commission has ignored their whole complaint by confining comment to their letters of 26 October 1992 to the Director General.

They accuse it of dilatoriness in using external data. By failing to make the introduction of such data retroactive it ensured that earlier underestimates of housing costs would hold good.

They observe that neither the Organization nor the Commission disputes the soundness of their claims. All that the Commission challenges is the reasoning which they developed in their letters of 26 October 1992, and that is now immaterial. They nevertheless contest some of the Commission's statements in its brief. The purpose of the questionnaire being to gather data on costs in Geneva, the Commission did not invite staff living in France to fill it up; in the absence of data on costs in France any references to them are speculative.

The complainants claim further amounts in costs.

G. Further observations which the Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 14 July 1994.

H. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission explains how the method of reckoning the rental/housing component of the post adjustment index has evolved over the years. Mistrust of data collected in surveys led the Commission to make improvements in the methodology on recommendations from its Advisory Committee on Post Adjustment Questions (ACPAQ).

The Commission says that it expressed the improvements "programmatically" rather than "normatively", the whole system being too complicated to allow of sudden change.

The Commission raises a procedural objection. Citing its own Statute and Rules of Procedure, it observes that they provide in elaborate detail for the participation of organisations and staff and that the staff representatives of WIPO may address it in writing or orally. So it -

> "... behooves staff members who are not satisfied with some aspect of the work of the Commission ... to cause their staff representatives, and possibly the executive head of the employing organization, to raise these points with the Commission in a timely and formal manner ... so that they might be considered before definitive decisions are taken by the Commission ..."

In this case the complainants failed to do so.

I. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants dismiss as "excuses" the Commission's reasons for not following the new methodology. They see in its attitude towards the ACPAQ "contempt for administrative practice and law" and contend that on the evidence the material decision was anything but "programmatic".

They claim yet further amounts in costs.

CONSIDERATIONS:

1. The pay of staff in the Professional and higher categories of the common system of the United Nations, to which WIPO belongs, is determined by reference to the pay of United States federal civil servants as adjusted to take account of differences in the cost of living between Washington D.C. and New York. A "margin" in favour of United Nations salaries is considered necessary to compensate for specific patterns of expatriate service. The margin remains within a range of 110 to 120, and the International Civil Service Commission applies procedures to ensure that it does so. Adjustment to pay is made either when the cost-of-living index which the Commission uses shows a variation of 5 per cent or - according to what is commonly known as the "twelve-month rule" - at the date of the first anniversary of the previous adjustment, whichever contingency is the earlier. For New York adjustment is made in November. For Geneva, where WIPO has its headquarters, the adjustment is made each July according to the twelve-month rule.

2. This complaint objects to the adjustment made to the pay of the Professional category staff of WIPO for July 1991 and in particular to the reckoning of the variation of the "rental/housing component" of the post adjustment index. The complainants contend that the Commission determined the index for July 1991 in breach of the applicable methodology; that it was improper to use the old methodology; that that methodology

was "inequitable" and "imprecise"; and that, since for some years a different one has been applied to pay of staff in the Professional category of the United Nations common system at New York, the staff of WIPO, who are stationed at Geneva, were unfairly treated.

3. In its reply the Organization stated that it and its Director General "neither affirm nor deny the information contained, or the statements set forth, or the allegations made by the complainants" and suggested that any additional information or commentary on the methodology involved or on the decisions challenged or any views on the merits of the complaint would have to come from the Commission. Judgment 1417 accordingly invited the Commission to file further submissions and the parties to file final briefs.

4. There is a general description of the system of post adjustment in Judgment 1457 (in re Di Palma and others), delivered this day, under 2 to 9. The same method has been used for many years, including 1991 and 1992, to establish the rental/housing component of the index, save at New York. It may be summed up as follows.

(a) Each year all "eligible staff" - broadly, those in grades P.1 to D.1 - are asked to fill up a questionnaire for the purpose of survey of the costs of housing and domestic service.

(b) The results of a survey are "tabulated" for each duty station and used to establish:

  (i) the "weight of the housing component" as part of the post adjustment index for the duty station; and

  (ii) the rental/housing component of the index at the duty station at the date of the survey.

(c) If that date coincides with the date of an interim adjustment the result of the survey is used to establish the rental/housing component of the index for the purpose of that adjustment; if not, the trend of the last two surveys before the date of the interim adjustment is "linearly extrapolated" to that date to establish the component.

5. Because of dissatisfaction with that part of the methodology - due mainly to the low rate of response by staff to the questionnaire - the General Assembly of the United Nations asked the Commission to look into the matter. After consulting its own Advisory Committee on Post Adjustment Questions (ACPAQ) the Commission did so and put conclusions and

recommendations to the Assembly at its 45th Session in 1990. The relevant passage read*:

> "The Commission invited the General Assembly to note that, under its statutory authority, it was empowered to take decisions concerning post adjustment and rental subsidy matters. However, bearing in mind that its proposals outlined below in this area form an integral part of the overall conditions of service of the Professional and higher categories of staff arising from the comprehensive review and that significant financial implications were associated with these proposals, the Commission considered that it would be appropriate to make recommendations to the General Assembly concerning the treatment of housing within the remuneration system and the revised rental subsidy scheme. In view of the above, the Commission decided to recommend to the General Assembly that:
>
> (a) the treatment of housing within the remuneration system should be improved by a series of measures focused to distinguish between duty stations where housing could be maintained within the post adjustment system and those duty stations where housing should be separated from the post adjustment system. Housing should be maintained in the post adjustment system in Group A duty stations covering headquarters, North American and European duty stations and field duty stations where housing comparisons could be made without serious difficulty. Housing would be excluded from the post adjustment system for duty stations in the field where valid housing comparisons were difficult or impossible. These would constitute Group B duty stations.
>
> (b) The treatment of the housing component in the calculation of post adjustment indices at Group A duty stations would be as follows:
>
> (i) _Place-to-place comparisons_ of housing costs would be retained as an integral part of the post adjustment system;
>
> (ii) _Post adjustment indices_ would incorporate housing cost relativities derived from gross, in place of net rents, so as to reflect

---

*_Report of the International Civil Service Commission for the year 1990_ (General Assembly, Official Records, 45th Session, Supplement No. 30, paragraph 95).

correct place-to-place housing cost relativities. In the case of homeowners imputed gross rents would be used;

(iii) Time-to-time adjustment of the housing component of the post adjustment index would be governed by housing price indices using external data as recommended by ACPAQ and as defined as follows:

a. The areas covered must meet accepted standards in terms, inter alia, of safety, commuting distance, the availability of shopping and the adequacy of public services and should, in principle, be areas where most of the staff currently in the duty station reside;

b. The size and type of dwellings should reflect the structure of the common system population, the existing combination of common system renters and homeowners for the areas selected, and should not be below minimum housing standards in terms of dwelling size relative to household size;

c. If feasible, rents used for computing housing relativities should be obtained for both newly rented and other dwellings;

d. If feasible, the index should be weighted to reflect characteristics of the common system population in the selected areas as regards size and type of dwelling and the period of residence in the dwelling. The components should be those already included by decision of the Commission."

6. The complainants submit that those detailed proposals for the treatment of the rental/housing component of the post adjustment index set out the methodology that the Commission was thereafter to apply.

7. The Commission explains in its last brief that it was always understood that carrying out the proposals to make yearly adjustment to the component on the strength of data from external sources was a complicated matter and required extensive research. The main proposal made by ACPAQ and endorsed by the Commission itself was to replace the results of housing surveys obtained from the questionnaires completed by staff with "external data", i.e. data on actual rental/housing costs at the duty station. The Commission points out that it is far more complicated to price real property than to price

goods and services and that "the only realistic possibility of assembling such data for all the duty stations of the UN system is to employ outside consultants". The secretariat of the Commission first obtained information on the type of housing used by staff. Then it was necessary to choose from among the available consultants by resort to the bidding procedures required by the Financial Regulations of the United Nations. Since none of the consultants met the precise specifications for reasonable fees, bids from others had to be put to ACPAQ for technical review. Preliminary bidding took place in April 1991 and the Commission's secretariat submitted the bids to the organisations and staff for comment in July 1991. There was further bidding in December 1992. A contract with one consultant was approved in December 1993. That consultant provided "survey design and data collection instructions" in February 1994 and they were sent to the organisations and staff for comment. The data obtained by that consultant on rents were put to ACPAQ in May 1994. A paper by the consultant on the methodology of "housing comparisons" was submitted to the Commission's secretariat in September 1994. But in October a working group on post adjustment expressed dissatisfaction with the consultant and asked the secretariat to find another source of external data on housing. The upshot was that in November 1994 the secretariat sent the organisations and staff for comment a paper by another consultant on the methodology of rent surveys. In December 1994 the new consultant provided data on rents at Geneva and at five other duty stations and in January 1995 made a survey of rents in New York. In February 1995 the secretariat's analysis of the data was presented to ACPAQ, which in turn provided guidelines for refinement of the data. The Commission was to review the matter in May 1995. It has been producing progress reports which acknowledge that much remains to be done in consultation with the organisations and staff.

8. The Commission submits that paragraph 95 of its report to the General Assembly in 1990 - set out in 5 above - is "in programmatic rather than in normative terms" and that its recommendations "were to serve as goals rather than as precise instructions".

9. Having considered the Commission's report for 1990, the General Assembly adopted a resolution, No. 45/241, on 21 December 1990. As to the matter that forms the subject of this case the resolution noted "the Commission's intention to review and evaluate the proposed procedures for the treatment of housing in the light of the experience gained". The Assembly then:

> "1. Urges the Commission to continue to pursue its examination of the remuneration structure, in particular concerning the treatment of housing, and to report its findings to the General Assembly, as appropriate, taking into account the views expressed by Member States in the Fifth Committee;

> 2. Takes note of the recommendations of the Commission with regard to the treatment of housing, as contained in paragraph 95 of its report;
>
> 3. Requests the Commission, as a matter of urgency, to continue to take measures to improve the measurement of the housing element in the remuneration package. ..."

10. The texts of the Commission's conclusions and recommendations and of the General Assembly's resolution support the Commission's contention that paragraph 95 of its report for 1990 set out no new methodology that was henceforth to be applied. Time must be allowed for the whole complicated matter to evolve: so much is plain from the foregoing account of the manifold difficulties the Commission has met in trying to collect data from external sources. The conclusion is that at the time material to this case the methodology was not the "new" one set out in paragraph 95 of the Commission's report, but the one that the Commission had been following till then.

11. The complainants further rely on a recommendation that ACPAQ made on the subject in its report dated 25 May 1990 on the work of its 15th Session*. The recommendation was that between full and interim place-to-place surveys, and "as an interim measure pending the use of data from external sources", the "housing component" of the local consumer price index should be used to update the post adjustment index, rather than the survey-based calculation made by means of "linear" extrapolation. That was the method followed for many years in New York and Washington D.C. But the Commission neither endorsed that recommendation nor reported it to the General Assembly. The Commission explains in its last brief:

> "The difficulty with that proposal was that at many duty stations the housing component of the [consumer price index] is distorted by the inclusion of subsidized or rent-controlled housing, which is not normally available to international officials. Consequently arrangements had to be made to secure data not subject to such distortion. In Geneva the Commission has recently arranged for the Cantonal Bureau of Statistics to prepare a special housing CPI from which subsidized housing is excluded. Consequently it was not until August 1993 that the Commission:**

---

* ICSC/32/R.5, paragraph 42(e).

** The Commission's report of 14 September 1993 on its 38th Session (July-August 1993): ICSC/38/R.19, paragraph 58.

> 'decided that, pending the acquisition of external data covering two periods with an interval of one year, local CPIs, divested of any element of subsidized housing if possible, should be used for the time-to-time updating of the [post adjustment indices] for headquarters duty stations'."

That decision of August 1993 was not retroactive and has no relevance either to the revision in July 1991 or to the revision in July 1992 of the rental/housing component under the twelve-month rule.

12. ACPAQ is a subsidiary body established by the Commission with the approval of the General Assembly to make recommendations to the Commission on the general administration of the system of post adjustments. It has no authority to make decisions. Its recommendations become part of the post adjustment system only when approved by the Commission. The conclusion is that the recommendation of ACPAQ which the complainants are relying on, and which the Commission did not accept, has no binding force and is therefore irrelevant to this case.

13. The complainants plead that the "old" methodology relating to the rental/housing component is inequitable and imprecise, and they base the plea on admission by the Commission of the inadequacy of the methodology in its report to the General Assembly in 1990. That report does list shortcomings in the methodology, but it is clear that attempts were being made to improve it. It is mistaken to contend that it is invalid while it is still being revised. The work had not been completed at the material time and not until the Commission's decision of August 1993 - set out in 11 above - was the methodology for Geneva altered. The plea fails.

14. The complainants argue that the recommendation which the Commission made in paragraph 95 of its report to the General Assembly in 1990 - see 5 above - should be construed as encompassing the one relating to the provisional use of the housing component of the local consumer price index. Again the argument fails. As was explained in 10 above, the Tribunal accepts that paragraph 95 did not lay down any binding methodology.

15. The complainants point out that for staff in New York the Commission had been using for many years the housing component of the local consumer price index established by the local statistical offices. But the Commission has explained that it was unable to use the housing component of the local index in Geneva because of distortion by the inclusion of subsidised or rent-controlled housing. And it was not until August 1993 that the Commission decided to use the local index

as negotiated with the Cantonal Bureau of Statistics for time-to-time adjustment to the rental/housing component. There is no suggestion of any distortion in the housing component of the local index in New York or in Washington D.C. for the "comparator" national civil service.

16. The Tribunal accepts that the Commission had to use different methodologies because of difficulty in getting hold of the correct data for Geneva. The fact that the shortcomings of the methodology applicable to Geneva are recognised does not make prior application of it invalid.

17. The complainants believe that it was improper to use the old methodology on the grounds that an improved methodology had been proposed and accepted. They are mistaken. The entire post adjustment system, not just the housing component, is complicated and the methodology is in a constant state of review. Suggested improvements may take time, as they have in the case of use of external data. Until a new methodology is adopted instead the Commission is not only entitled but indeed obliged to use the existing one. Since there was no instant adoption of a new methodology in 1990 the methodology to be applied in calculating the rental/housing component of the post adjustment index for July 1991 was the old one.

18. In its latest brief the Commission raises a procedural objection set out under H above. But since the complaint fails on the merits, there is no need to entertain that objection.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

SEVENTY-NINTH SESSION

In re HOEBRECK, SCHWARZ and YOSSIFOV

Judgment 1459

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Jean-Paul Hoebreck, Miss Linda Schwarz and Mr. Vladimir Yossifov against the World Intellectual Property Organization (WIPO) on 24 February 1994;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the third paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a final brief;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear in Judgment 1417 under 1 and 2. The complainants belong to the Professional category of staff of WIPO. According to WIPO Staff Regulation 3.5(a) base salaries of staff of the Organization in the Professional and higher categories are "adjusted" to variations in the cost of living at Geneva. That is done by reference to a "post adjustment index" and by payment to the staff of a non-pensionable allowance known as "post adjustment". The index for Geneva serves as a measure of the cost of living there as against New York, the duty station that the common system of the United Nations takes for the sake of comparison.

Regulation 3.5(e) reads:

"The multiplier applied for calculating the post adjustment shall be that established for Geneva by the

> International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

To calculate the post adjustment index, of which "rental/housing" costs are a main component, the Commission carries out periodic surveys of the cost of living at duty stations in the common system of United Nations organisations. Subtracting 100 from the post adjustment index gives the figure known as the "multiplier" which is multiplied by 1 per cent of base salary to yield the amount of the post adjustment allowance.

By circular 45/1992 of 23 July 1992 the Organization announced the multiplier which it was applying to pay as from July 1992. The multiplier was to be 92.2 because of changes in the rate of exchange between the Swiss franc and the United States dollar as well as the results of a so-called "time-to-time" adjustment. The increase in net pay since the last such adjustment in July 1991 was - said the circular - to be "about 2.0 per cent".

On 14 September 1992 the Director of the Personnel Division sent staff in the Professional and higher categories a memorandum in answer to queries about pay. He said that the Chairman of the Commission had not answered a request he had made on 10 July 1992 for a "detailed explanation" of the multiplier for July 1992. Failing such information, he appended a copy of a memorandum which a senior officer of the Commission's secretariat had sent on 16 July to the chief of the Financial Resources Management Service of the United Nations Office at Geneva. The conclusions of the memorandum were (1) that the "out-of-area component" had raised the post adjustment allowance pertaining to the middle of grade P.4 in Geneva by 1.2 per cent between July 1991 and June 1992 and by 0.1 per cent in July 1992; and (2) that although the rise in net pay between July 1991 and July 1992 had been "substantially lower" than the local rate of inflation that difference became "negligible" when spread over the full two years since the Commission's last comparative survey of living costs in New York and Geneva.

By letters of 26 October 1992 the complainants submitted to the Director General under Staff Rule 11.1.1(b)(1) requests for review of the decision to apply the new multiplier to their pay for July 1992. They claimed an increase of 2.9 per cent in pay for that month and proportionate increases for any later months in which the multiplier might be tainted with "the same errors" in the housing and out-of-area components. They asked the Director General, if he refused, to relieve them of the obligation to go to the Appeal Board.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the chairman of the Appeal Board in letters of 15 January 1993.

The Board invited but did not receive comment on the cases from the Commission. In its report of 11 October 1993 it recommended that the Director General should revise the multiplier using the proper rate of exchange to determine the out-of-area component and pay the complainants the amounts due as from August 1992. The Director General having taken no further decisions, the complainants are impugning the rejection which they infer under Article VII(3) of the Tribunal's Statute.

B. The complainants submit that both the housing and out-of-area components of the post adjustment index for July 1992 were flawed and therefore the multiplier applied to their pay was unlawful.

Four of their pleas challenge the housing component.

The first is breach of patere legem quam ipse fecisti. On 21 December 1990 the General Assembly of the United Nations approved a methodology which the Commission had proposed and which required (1) place-to-place comparison of housing costs, (2) assessment of housing costs based not on net but on gross rent or, in the case of home-owners, imputed gross rent and (3) "time-to-time adjustment" of the housing component of the post adjustment index using such "external data" as type of neighbourhood, distance from work and size of dwelling. But the Commission failed to apply its own methodology.

The complainants' second plea is that the method the Commission followed was on its own admission "inequitable" and "imprecise". The General Assembly acknowledged as much by calling on the Commission "as a matter of urgency ... to improve the measurement of the housing element in the remuneration package". But the Commission held to its old methods, which underestimated actual housing costs.

Thirdly, they allege breach of equal treatment. The Commission has a duty under the Noblemaire principle* to see that pay at different duty stations has uniform purchasing power. Though it took account of the housing component of the consumer price index for New York, it did not do so for Geneva. If it had taken account of the increase in rents in the consumer price index for Geneva, the post adjustment index for July 1992 would have been 2 per cent higher.

---

* For an explanation of this principle, see Judgment 825 (in re Beattie and Sheeran) under 1 to 5.

The complainants contend that because of the acknowledged flaws in the old methodology reliance on it was improper insofar as an "improved" methodology had been "proposed and accepted".

Lastly, they charge the Organization with breach of the duty of care it owes them. Three years had passed and still the promised changes tarried. Instead of applying the Commission's dictates without "much further" ado WIPO should have tried to put the adjustment right.

As to the out-of-area component the complainants allege three flaws.

The first is a defect in the applicable methodology. The so-called "four-month waiting period" gives the Commission time in which to gather and analyse data on the cost of living before adjusting pay. It meant that post adjustment for July 1992 reflected changes in the cost of living up to March. But when reckoning the out-of-area component, in which costs are expressed in dollars, the Commission used the rate of exchange for July 1992, when the dollar stood at only 1.37 Swiss francs as against 1.49 in March 1992. That alone meant that their pay for July 1992 was 9.37 francs lower than it should have been.

Secondly, they plead that the method by which the Commission determined the rate of exchange for July 1992 is at odds with the standard of "reasonableness". The levels of pay at Geneva depend "for a whole year" on the value of the dollar in terms of the Swiss franc on the last-but-one working day of June. Any fall in that value on that one day will mean lower pay for the next twelve months.

Thirdly, they allege breach of equal treatment. By measuring out-of-area costs up to March by reference to the rate of exchange for July 1992 the Commission discriminated against staff at Geneva: the pay of staff in New York is not subject to variation in any rate of exchange.

They seek the quashing of the decisions setting their pay for July 1992 and any months thereafter. They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year, and awards of 3,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO concedes that the complaint is receivable under Regulation 3.19(a), which gives staff members two years in which to claim any payment due under the Staff Regulations or Rules.

On the merits the Organization submits that it had nothing to do with the Commission's choice of the method of determining the multiplier: that was a matter for the Commission alone. The Organization neither confirms nor denies the complainants' allegations.

D. In their rejoinder of 10 May 1994 the complainants contend that WIPO is yet again in breach of its duty, stated in Judgment 1265 (in re Berlioz and others), to see that any "elements of the common system or any other outside system" which it puts in its own rules are lawful. At least one other organisation that belongs to the common system has refused to apply a multiplier from the ICSC which it thought flawed.

E. The Commission sent WIPO on 13 May 1994 a letter and observations which the Organization filed on its behalf on 13 June. Commenting on issues the complainants raised in their letters of 26 October 1992 to the Director General about "methodology", the Commission acknowledges the value of data from outside sources but observes that no deadline was set for "the implementation of external data", which it was "always recognized" would take a long time. Although the Commission has used the rent component of the consumer price indices at New York and Washington D.C. it was not bound to do so elsewhere; its decision to use the component of the Geneva index took effect only as from August 1993. As to the response to its questionnaire about housing, an "accurate calculation" would have required replies from staff stationed at Geneva but living just over the Swiss border, in France; but such staff did not fill up the questionnaire. One reason for the "discrepancy" between the rate of inflation at Geneva and the steep rise in mortgage rates there is that mortgage rates affect new rents more than older ones; so it takes time for them to push up the consumer price index.

Had the Commission reckoned the out-of-area component according to the rate of exchange in force four months before it made the adjustment it would have had to convert back into the dollar at the date of implementation. That would have produced different results for each duty station and cause successive gains and losses that would "in the long run" cancel each other out. It therefore helps to avoid penalising staff at duty stations where the proportion of out-of-area costs is higher than at Geneva. The present method is based on measurements of the cost of living in 21 countries.

F. In their further submissions of 14 July 1994 the complainants contend that the Commission has ignored their whole complaint by confining comment to their letters of 26 October 1992 to the Director General.

They accuse it of dilatoriness in using external data. By failing to make the introduction of such data retroactive it ensured that earlier underestimates of housing costs would hold good.

They observe that neither the Organization nor the Commission disputes the soundness of their claims. All that the Commission challenges is the reasoning which they developed in their letters of 26 October 1992, and that is now immaterial. They nevertheless contest some of the Commission's statements in its brief. The purpose of the questionnaire being to gather data on costs in Geneva, the Commission did not invite staff living in France to fill it up; in the absence of data on housing costs in France any references to them are speculative.

The Commission failed to grasp the effect of rates of exchange on pay, not just on the post adjustment index. Its task is to see that the figure of pay is right at all times, not sometimes too low and sometimes too high.

The complainants claim further amounts in costs.

G. Further observations which the Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 14 July 1994.

H. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission makes comments on the rental/housing component of the post adjustment index which are summed up in Judgment 1458 (in re Damond and others), delivered this day, under H. As to the out-of-area component it observes that the method the complainants prefer would make for anomalies: it would have lowered the post adjustment allowance for Geneva by 1.2 per cent from July 1991 to June 1992.

I. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants enlarge on their arguments on the rental/housing component. They point out that the Commission has changed its method of reckoning the out-of-area component.

They claim yet further amounts in costs.

CONSIDERATIONS:

1. The complainants are challenging the amount of their pay for July 1992 and in particular the calculation of the "out-of-area component" and the "rental/housing component" of the post adjustment index.

2. There is a general description of the system of post adjustment in Judgment 1457 (in re Di Palma and others), delivered this day, under 2 to 9.

3. In its reply the Organization stated that it and its Director General "neither affirm nor deny the information contained, or the statements set forth, or the allegations made by the complainants" and suggested that any additional information or commentary on the methodology involved or on the decisions challenged or any views on the merits of the complaint would have to come from the Commission. Judgment 1417 accordingly invited the Commission to file further submissions and the parties to file final briefs.

4. In its latest brief the Commission devotes a chapter to the out-of-area component of the post adjustment index. Under the heading "Technical and Historical Background" it explains that 85 per cent of staff in the Professional and higher categories in the common system of the United Nations are expatriates. They incur some of their expenditure elsewhere than in the country of their duty station and in the currencies of other countries. For staff at headquarters duty stations the proportion of such expenditure is estimated at 10 per cent on the average. Since it is hard to obtain data on actual expenditure of that kind there is resort to what is known as an "out-of-area index". It reflects prices in 21 countries and they are converted into United States dollars. Between the dollar and the currency of the country of the duty station the rate of exchange will of course vary. So the problem is, in the Commission's words, to determine -

> "the relationship among the dates as to which the out-of-area price data for a particular [post adjustment index] is valid; as of which the exchange rate of US dollars to local currency should be used; and as of which the new [index] becomes effective."

For all calculations of the index there has since 1964 been a rule requiring a "four-month waiting period". The Commission's Advisory Committee on Post Adjustment Questions (ACPAQ) and the Commission itself review the working of the rule from time to time. The Commission confirmed it at its 35th Session in March 1992.* In its brief the Commission accounts for it in the following language:

> "The delay rule is necessitated by the fact that because of the inherent cumbersomeness in making the extensive and complicated [post adjustment index] calculations and then announcing them in time to permit prompt implementation by the organizations, there must be some time-lag between [the date] of the data used and the date of implementation. For this purpose, four months is considered the minimum practicable delay period."

5. The Commission carried out in 1989 a comprehensive review of the conditions of service of the Professional and higher categories of staff, including pay. It did not eliminate the effects of currency fluctuation. It maintained what it calls the "zero point five per cent rule", which is designed to stabilise pay between cost-of-living adjustments and which limits to plus or minus 0.5 per cent any changes in local currency pay that are due to currency fluctuation. The out-of-area component of the index reflects the cost in dollars of purchasing similar goods and services in various countries. When currencies fluctuate considerably the movement of the out-of-area index from one month to the next depends almost entirely upon variations in rates of exchange between the dollar and other currencies or groups of currencies.

6. In accordance with the "four-month rule" the post adjustment index for July 1992 was based on the out-of-area index established four months earlier, in March 1992, when the Swiss franc - the currency of the country of the complainants' duty station - had stood at 1.49 to the dollar. The calculations were as follows:

(1) At the "base date", which was in May 1990, out of every 1000 Swiss francs of pay 100 were taken to cover out-of-area expenditure. At the time the rate of exchange stood at 1.46 Swiss francs to the dollar; so 100 francs came to $68.49.

(2) The out-of-area index at the base date stood at 170.68, and by March 1992 had risen to 194.75. The ratio of 194.75 to 170.68 was 1.141. Applying that ratio to $68.49 gave a figure of $78.15.

(3) By March 1992 the rate of exchange was 1.49 Swiss francs to the dollar.

---

*ICSC/35/R.17, paragraph 61(a).

(4) By July 1992 it was 1.37. That being the rate used according to the methodology to work out pay for July 1992, the figure came to $78.15 x 1.37, or 107.07 Swiss francs, for each original unit of 100 Swiss francs, and the complainants were paid accordingly for that month.

7. The complainants plead a flaw in the methodology that the Commission used. They contend that the methodology should have provided for application of the rate of exchange for March 1992 so as to yield a figure of 78.15 x 1.49, or 116.44 Swiss francs for each original unit of 100 Swiss francs. They further contend that the method of determining the rate of exchange is unreasonable in that levels of pay for staff stationed at Geneva depend for a whole year on the value of the dollar on the last-but-one working day of June each year. They observe that, supposing that the dollar fell against the Swiss franc by 10 per cent on that day the level of pay would as a result be one per cent lower throughout the following twelve months even if the dollar recovered the 10 per cent loss the very next day. They observe that residents in New York do not have to cope with the consequences of currency fluctuation.

8. One preliminary comment is that in a system that is based on the dollar residents in New York are quite obviously unaffected by fluctuation in the rates of exchange of the dollar: according to the system of post adjustment New York sets the norm, and there can be no inequality of treatment as long as the system achieves parity in the purchasing power of pay.

9. The Commission argues in its latest brief that if the complainants' suggestion were followed it would make for anomalies. It says:

> "If, as suggested by Complainants, the out-of-area index four months prior to the implementation date were converted into local currency at the exchange rate of that month and then converted back to dollars at the exchange rate of the implementation date, there would be a different out-of-area index for each duty station, which would depend more on the currency fluctuation of the duty station rather than on the 21 countries used in the calculation of the index (even if prices at that duty station was [sic] not considered in the calculation of the out-of-area index)."

The Commission observes that, even if the index had been calculated as the complainants suggest, the post adjustment for Geneva would have been "1.2 per cent lower from July 1991 to July 1992". The Commission concedes that its method is imperfect and observes that ACPAQ took up the issue at a recent session and has submitted a detailed report. But the Commission maintains that pending change it is entitled to use the old long-established method of calculating the post adjustment index.

10. The complainants are not alleging that the Commission has misapplied its own methodology, but want it to follow a different one. They would also like different application of the "four-month" and "twelve-month" rules. Even if the Commission is reviewing and reforming points of its methodology it does not thereby invalidate what has gone before. Nor can its acknowledgement of the need for constant review be seen as an admission that the methodology is totally flawed. The whole subject of post adjustment is of great complexity and that, and the constant changes in the factors that are considered relevant, mean that the methodology will probably never attain perfection. Though the complainants' objections to the current methodology reflect concerns which arise when the dollar is in decline in terms of the local currency, and though the Commission failed to eliminate the effects of currency fluctuation in 1989, it has kept the matter under constant review. The objections are not sustained.

11. As to the variation in the housing component of the index the complainants put forward the same arguments as do the complainants in the case on which the Tribunal rules this day in Judgment 1458 (in re Damond and others). For the reasons set out in that judgment their pleas fail.

12. The complainants make the further plea of breach of the duty of care on the grounds that three years had passed and the promised changes were yet to come. For the reasons stated in Judgment 1458 under 13 to 17 the Tribunal holds that the Commission merely drew up a programme of goals that were to be achieved. For that purpose it is still working out the details. In those circumstances the Tribunal rejects the plea.

13. In its latest brief the Commission raises a procedural objection set out under H in Judgment 1458. But since the complaint fails on the merits there is no need to entertain that objection.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-NINTH SESSION

In re DERQUE, HANSSON (No. 2)
ILARDI, MAKADI and SEINET

Judgment 1460

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Raymonde Derqué, Mr. Alfredo Ilardi, Mr. András Makádi, Mrs. Eliane Seinet and the second complaint filed by Mr. Bo Alfred Hansson against the World Intellectual Property Organization (WIPO) on 31 March 1994;

Considering the interlocutory order in Judgment 1417 of 1 February 1995 and the submissions by the complainants, the Organization and the International Civil Service Commission (ICSC) that are cited in the fourth paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with points 1 and 2 of the decision in Judgment 1417, by the Commission on 6 March 1995 and by the complainants on 12 April, and WIPO's letter of 1 May 1995 informing the Registrar that it did not wish to submit a further brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. WIPO Staff Regulation 3.5 reads:

> "(a) The base salaries of staff members in the Professional and higher categories shall be adjusted by the application of non-pensionable post adjustments, the amount of which shall be determined by multiplying one per cent of the corresponding base salary at the dependency or single rate by a multiplier reflecting the post adjustment classification of the duty station.
>
> ...
>
> (e) The multiplier applied for calculating the post adjustment shall be that established for Geneva by the

> International Civil Service Commission, and the effective date of any change in the multiplier shall be as fixed by the said Commission."

Regulation 1.3 reads:

> "While the whole time of staff members is at the disposal of the International Bureau [of WIPO], the normal working week, for staff members in full-time employment, shall be 40 hours, not including time for meals. ..."

At its 28th Session (23 September-2 October 1991) the Coordination Committee of WIPO, which has its headquarters in Geneva, set up a Working Group on Professional Remuneration. The group was to "establish the facts", among other matters, about "the alleged inequality of treatment between staff serving in Geneva and those serving at the base of the common system (New York)". In a memorandum of 20 January 1992 the Director General informed the group that "Professional staff members in Geneva are required to work 11.8 per cent more hours per year than Professional staff members in New York".

At its 30th Session (21-29 September 1992) the Committee examined a report from the group and approved a statement by the Director General that he intended to ask the International Civil Service Commission to review "the working hours question".

The Commission considered the matter at its 38th Session (15 July-3 August 1993) and decided to "maintain the current common system practices" and so to inform the General Assembly of the United Nations. By resolution 48/224 of 23 December 1993 the Assembly endorsed the Commission's decision.

By circular 47/1992 of 10 August 1992 the Organization announced the multiplier* which it was applying as from August 1992 to the pay of staff in the Professional and higher categories. The multiplier was to be 99.

The complainants belong to the Professional and higher categories of staff of WIPO. In letters dated 1 October 1992 they submitted to the Director General under Staff Rule 11.1.1(b)(1) requests for review of their pay for August 1992, which they said was based on an unlawful multiplier. They asked him to treat their requests as claims to payment due under Regulation 3.19(a) and, if he refused, to relieve them of the obligation to go to the Appeal Board.

---

* For an explanation of the multiplier, see Judgment 1457 (in re Di Palma and others) under A and B.

In the absence of a reply from the Director General within the six-week time limit in Rule 11.1.1(b)(2) they submitted appeals to the Chairman of the Appeal Board in letters of 18 December 1992.

In its report of 5 November 1993 the Board recommended that the Director General make good their loss of 11.8 per cent in pay as from 1 August 1992, if necessary in two or three instalments.

Failing a decision by the Director General within sixty days of the date of the Board's recommendation they are impugning the implied rejection of their claims.

B. The complainants submit that the multiplier applied to their pay for August 1992 is tainted with mistakes of fact and law. They have four main pleas.

The first is that WIPO acted in breach of the principle of equal pay for work of equal value, as set out in Article 23(2) of the Universal Declaration of Human Rights: it overlooked the essential fact that the working week of staff belonging to the common system of the United Nations is on average 11.8 per cent longer in Geneva than in New York.

Secondly, the complainants plead breach of the basic principles of the common system, which is supposed to provide "uniform" standards of employment at all duty stations. Though the Commission takes a firm stand when it believes that a specialised agency of the United Nations has departed from the rules of the system it sees nothing wrong with treating staff better at New York than at Geneva.

The complainants' third argument is that there are no "objective" reasons for giving them different treatment, be it working conditions in New York or some special feature of the work assigned to Professional category staff. The Commission is wrong to rely, as it did in its annual report for 1993 to the General Assembly, on the difficulty of correcting defects in the methodology.

Lastly, the complainants charge the Commission with failing to discharge the duty of care it owed to staff throughout the common system. Maintaining the current practice constituted a breach of the basic rights of staff as construed in the case law.

They seek the quashing of decisions setting their pay for August 1992 and any months thereafter. They claim payment of the further amounts due, plus interest at the rate of 8 per cent a year. They ask the Tribunal to send their case back to the Organization for a "new decision in respect of the period following the date of the judgment" and to award them 5,000 Swiss francs each in costs.

C. In its reply of 14 April 1994 WIPO cites Regulation 3.19(a), which gives staff two years in which to claim any payment due under the Staff Regulations or Rules. It therefore raises no objection to the receivability of the complainants' challenge to their pay as from August 1992.

On the merits the Organization agrees that there was breach of equal treatment. Since the complainants have to work 11.8 per cent longer than officials in the Professional and higher categories in New York they should have their pay adjusted accordingly.

D. In their rejoinder of 4 August 1994 the complainants contend that since WIPO agrees with them their claims must succeed.

E. Observations which the International Civil Service Commission made on 14 October 1994 and which WIPO filed on its behalf on 18 October address the complainants' brief of 4 August 1994. The Commission points out that the "sole purpose" of the post adjustment system is to make for parity of purchasing power between duty stations. So it cannot, as the complainants wish, "equalize pay per hour of scheduled work". Since the whole of a staff member's time is at the Director General's disposal office hours are "irrelevant" to the determination of pay.

F. In the further submissions which the Tribunal invited in point 1 of its decision in Judgment 1417 the Commission maintains that the post adjustment system is supposed to safeguard the parity of the purchasing power of staff in the Professional and higher categories at all duty stations and that the complainants are wrong to expect the system to ensure equal pay for equal hours of work. It is a "mathematical" impossibility to achieve both purposes.

The rules allow working hours to vary from place to place and make no provision for the payment of overtime work done by staff in the Professional and higher categories. Comparison between pay in the common system and pay in the United States federal civil service - the employer of reference or "comparator" - discounts any differences in the working week. The General Assembly has often endorsed the Commission's practice of dissociating hours of work from pay.

G. In the final submissions which the Tribunal invited in point 2 of its decision in Judgment 1417 the complainants say that the Commission has failed to answer their main objection. On the pretext of replying to their contention that the rules and practice of the common system infringe "fundamental" principles of law the Commission merely professes to have complied with the material rules.

They claim further amounts in costs.

CONSIDERATIONS:

1. The system of post adjustment in the common system of the United Nations, to which WIPO belongs, is explained in Judgment 1457 (in re Di Palma and others) under 2 to 9.

2. The complainants are challenging the amounts of their pay for August 1992. They say that in Geneva the working week is 40 hours as against an average figure of 35.625 hours in New York. They calculate on the strength of those figures that their pay should have been 11.8 per cent higher. They contend that the multiplier which the International Civil Service Commission established for Geneva and which WIPO used in reckoning the figures of pay of staff in the Professional and higher categories for August 1992 overlooked that fact; that the multiplier was therefore determined in disregard of the principle of equal pay for work of equal value; and that the amounts of pay were too low.

3. The gist of the Organization's reply was that it and its Director General agreed with the complainants' submissions. Judgment 1417 accordingly invited the International Civil Service Commission to file further submissions and the parties to file final briefs.

4. Regulation 1.3 of the Staff Regulations of WIPO, which is set out under A above, says that the normal working week is forty hours. Rule 101.2(a) of the Staff Rules of the United Nations provides that the Secretary-General shall set the normal working hours for each duty station.

5. In its latest brief the Commission argues that the consistent interpretation put on the rules is that different hours of work are set for each duty station according to different local requirements.

6. A note by the secretariat of the Commission was submitted to the Commission at its 38th Session (July/August 1993) under the heading "Relationship between hours of work and

remuneration".* The note explains in paragraphs 17 to 20 how "local practice" may affect the working week. It says:

> "... the work schedule is an element of remuneration that is taken into account at the time of General Service salary surveys. Not only is an adjustment made to surveyed salaries on an employer-by-employer basis for differences in internal/external work schedules, but also organizations are encouraged to maintain a work schedule that, as far as possible, is in accord with local practice. The Commission has, on occasions, made recommendations to the executive heads for a change in the internal work schedule, when it was noted, in reviewing General Service results, that there was a significant difference between internal/external work schedules. Accordingly, the General Service survey process influences the work schedules of the organizations and thereby the work schedule of the Professional and higher categories. The organizations' work schedules are therefore often a reflection of local practice as related to the General Service category."

It goes on:

> "The work schedule of the United Nations common system in New York is no exception in this regard. ... [It] generally reflects the fact that in New York the working hours of the local labour market are shorter than in almost any other city in the United States.
>
> ...
>
> The question may arise as to why New York, when compared to all other cities in the United States, has such a significantly lower average work schedule ... The limited evidence the secretariat has been able to obtain ... suggests that the lower working hours in New York are a direct consequence of the longer commuting time ... Statistics on working hours ... show that New York has one of the shortest work schedules in the United States and the longest average commuting schedules. ..."

Hours of work vary between headquarters duty stations in the common system: thus in Montreal they are 34.7, in New York 35.625, in Rome 37.5, in Vienna 39.3, and in Geneva and Paris 40. The issue in this case is whether Professional and higher categories of staff employed at Geneva by an organisation that belongs to the common system ought to be compensated because their working week is longer than that of such staff in New York. The complainants submit that there are no objective grounds for the difference in hours between New York and Geneva and that the Commission has failed in the duty of care it owes to staff stationed in cities other than New York. The Commission answers that the sole purpose of the system of post adjustment is to ensure parity in the purchasing power of pay for staff in the Professional and higher categories between different duty stations; that the number of hours actually worked at any particular duty station has no bearing on post adjustment; and that the system of post adjustment is not a proper means of having differences in such hours taken into account.

---

* ICSC/38/R.15.

7. The Commission took up the question of working hours at its 38th Session. Its conclusions appear in the report it submitted for 1993 to the General Assembly of the United Nations at its 48th Session (February 1994).* The relevant passage is in paragraph 181 of that report and reads:

> "The Commission considered that the nature of Professional-level work was such that it did not lend itself to strict adherence to work schedule parameters. Furthermore, no overtime was paid to Professional staff in the common system. Some members of the Commission expressed the view that the consideration of work schedule parameters for Professional staff was demeaning. In that regard, the Commission did not consider it possible to circumscribe Professional work activities by a time element as was done for production workers on piece-work or clerical workers subject to overtime payments. The Commission considered that it was expected that Professional staff would complete a task or project without strict concern for the schedule of working hours and without expectation of a salary adjustment to account for the extra hours worked, or compensatory time off. It was noted, in that regard, that the work schedules applicable at common system duty stations were based largely on local practice as determined at the time of local General Service salaries surveys."

8. In resolution 48/224, adopted at its 48th Session, the General Assembly declared in a section headed "Relationship between hours of work and remuneration" that it concurred fully with the views expressed by the Commission on the subject and endorsed its decision to "maintain the current common system practice with regard to working hours".

---

* Report of the Commission for the year 1993, General Assembly, Official Records, 48th Session, Supplement No. 30, A 48/30.

9. The Commission points out that under the current application of the so-called "Noblemaire principle"* comparison is made between the pay of Professional category staff in the common system and that of their counterparts in the "comparator" service, which is the federal civil service of the United States; that such comparison takes into account the difference in the cost of living between New York, the "base" city of the common system, and Washington D.C., the base city of the comparator civil service; but that no adjustment is made on account of the difference in the length of the working week between those two cities, though similar staff in the United States federal civil service have a 40-hour week. Indeed the system of pay for staff in the Professional and higher categories makes no adjustment on account of any differences in hours of work.

10. The Commission's plea is upheld. The system of post adjustment is of no relevance to differences in working hours, being concerned solely with parity of purchasing power, and is not an appropriate means of securing compensation for differences in working hours between duty stations. The system makes no provision for such equalisation of working hours.

11. The whole time of staff members in the Professional and higher categories is at the Organization's disposal and they are properly expected to complete the work assigned to them without compensation for any overtime. It is therefore permissible to base their working week on the conditions prevailing at their duty station and to make no adjustment in pay to take account of differences in hours of work within the common system.

DECISION:

For the above reasons,

The complaint is dismissed.

---

* For an explanation of the principle, see Judgment 825 (in re Beattie and Sheeran), under 1 to 5.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re BORRELLO and CHANT **Judgment 1461**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) by Miss Sarah Jane Chant on 12 October 1994 and by Miss Carole Françoise Borrello on 13 October 1994 and corrected on 19 and 24 October 1994, Eurocontrol's replies of 19 and 26 January 1995, the complainants' rejoinders of 10 March and the Organisation's surrejoinders of 28 April 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to this case is set out under A in Judgments 1403 (in re Tejera Hernandez) and 1411 (in re Bidaud).

Both complainants are clerical staff in category C at Eurocontrol's Experimental Centre at Brétigny-sur-Orge, in France. Miss Borrello joined the Agency in 1990 and has a grade C4 post. Miss Chant took up duty in 1991 and is at grade C5.

On 10 and 16 November 1993 they wrote to the Director of Personnel applying for the "typist's allowance" provided for in Rule No. 7, Section 2a, Article 4a of the Rules of Application of Eurocontrol's Staff Regulations. Clerical staff in category C may sometimes qualify for that allowance.

Having got no reply within the four months prescribed by Article 92 of the Staff Regulations, they sent the Director General memoranda on 6 and 7 June 1994 lodging internal "complaints". By letters of 13 July 1994 - the impugned decisions - the Director of Personnel rejected their "complaints" on the Director General's behalf.

B. The complainants submit that the practice at Eurocontrol is to grant the typist's allowance to clerical staff who spend much of their working time on jobs that involve the use of a typewriter or a computer keyboard. They qualify for the allowance because they spend over half the time on computer work. By refusing to let them have it the Agency has broken the rules.

There is also breach of the rule against retroactivity: the Administration may alter the requirements for granting the allowance for the future but not apply to them a decision yet to be taken.

Lastly, they plead discrimination in that the Agency granted the allowance to staff in other units who are in like case.

They ask the Tribunal to quash the decision to reject their "complaints"; to rule that they are eligible for the typist's allowance; to order the Agency to pay them the allowance as from dates in November 1993, plus interest on the arrears; and to award them costs.

C. The Agency replies that nothing in the rules entitles a clerical officer to the typist's allowance. It has no practice in the matter, having granted the allowance to some such officers only in exceptional instances.

The complainants' jobs were technical when they joined the Agency and they did not then qualify for the allowance. Nor do they now since their duties have not changed. Only a tiny fraction of their time is spent on typing or on computer work.

Eurocontrol did act in accordance with the rules and did not disregard the rule against retroactivity.

It denies discriminating against the complainants: it has not granted the allowance to anyone in their unit.

D. The complainants contend that their duties have changed since they joined the Agency and deny that they are technical. They press their pleas.

E. In its surrejoinders Eurocontrol maintains that the complainants' duties are mostly technical and of a kind that demands use of a keyboard. It enlarges on its pleas.

CONSIDERATIONS:

1. Eurocontrol recruited Miss Borrello on 16 September 1990 and Miss Chant on 1 April 1991 as class II clerical staff. It assigned them to the technical division of the Central Flow Manual Unit (CFMU) of its Experimental Centre, and they held grade C5. On 1 January 1992 it promoted Miss Borrello to C4. In November 1993 the complainants claimed payment of the "typist's allowance" provided for in Article 4a of Section 2a of Rule No. 7 concerning remuneration. Having got no reply from the Administration, they submitted "complaints" in June 1994 against the implied rejection of their claims. By two letters dated 13 July 1994 and identical in substance, one in English and the other in French, the Director of Personnel rejected their "complaints" on the Director General's behalf for lack of merit. Those are the decisions they are impugning.

2. Since the two complaints raise the same issues of fact and law and seek the same redress they are therefore joined to form the subject of a single judgment.

3. Article 4a of Section 2a of Rule of Application No. 7 reads:

> "An official in category 'C' employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance."

Although the article does not confer the allowance on clerical staff Eurocontrol acknowledges that in exceptional instances, ad hoc and by analogy it has granted the allowance to some clerical staff in category C provided they spend at least three-fifths of their time typing or half of it working on a computer keyboard. But in reply to the complaints it makes out that to qualify for the allowance the staff member must have duties akin to the secretarial and typing tasks which the allowance is intended to reward and that though the complainants do use a keyboard such use is incidental to other work that is neither in quality nor in quantity akin to that of someone whose main job is typing.

4. The complainants challenge the construction that Eurocontrol puts on a rule that it has itself made on the grant of the allowance to clerical staff. They argue that the Tribunal affirmed the rule in Judgment 1403 (in re Tejera Hernandez) of 1 February 1995 and that they satisfy the criteria endorsed therein. The Director of the CFMU said as much in a letter of 7 June 1994 to the Director of Personnel when he affirmed that they spent three-fifths of their time typing or half of it working on a computer keyboard.

5. Their plea succeeds. Those are indeed the "objective criteria" which Judgment 1403 acknowledged under 11 and 12, pointing out that such broad construction of the rule goes back to 1965 and that Eurocontrol's practice puts it under an obligation.

6. None of the criteria Eurocontrol applied in earlier cases required that clerical staff claiming the grant should be performing tasks akin, either mostly or incidentally, to those of a secretary or typist. The Agency fails to show that it imposed this further requirement in the past and that it therefore forms part of the practice affirmed in the judgment. By rejecting the complainants' claims on such grounds Eurocontrol is in breach of the rule by which it is bound through its acknowledged practice of granting the allowance to clerical staff. Moreover, by refusing the allowance only to the complainants under that mistaken pretext, it has discriminated against them. So the impugned decisions cannot stand.

7. Since the decisions are set aside the complainants are also entitled to payment of the interest on arrears that they claim. As Judgment 1403 said under 7, interest on arrears is due by virtue of the principle of equal treatment embodied in the Staff Regulations. The principle lays on the Organisation the duty to pay such interest so as to restore parity between someone who got the allowance at the due date and someone who got it later.

DECISION:

For the above reasons,

1. The Director General's decisions of 13 July 1994 are set aside.
2. Eurocontrol shall pay the typist's allowance to Miss Chant as from 10 November 1993 and to Miss Borrello as from 16 November 1993, together with interest at the rate of 10 per cent a year on the amounts due.
3. It shall pay each of them 1,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas E. Razafindralambo P. Pescatore

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re DROGOUL, ROELOFSEN No. 2 and SHEEHAN

Judgment 1462

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Joyce Roelofsen against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 4 October 1994, Eurocontrol's reply of 8 December 1994, the complainant's rejoinder of 11 January 1995 and the Organisation's surrejoinder of 31 March 1995;

Considering the complaint filed against Eurocontrol by Miss Carol Sheehan on 5 October 1994, Eurocontrol's reply of 15 December 1994, the complainant's rejoinder of 27 January 1995 and the Organisation's surrejoinder of 7 April 1995;

Considering the complaint filed against the Organisation by Mr. Fabrice Drogoul on 5 October 1994 and corrected on 21 October 1994, Eurocontrol's reply of 12 January 1995, the complainant's rejoinder of 30 January and the Organisation's surrejoinder of 7 April 1995;

Considering the application filed by Mrs. Marie-Thérèse Guérin on 30 March 1995 to intervene in Mrs. Roelofsen's and Miss Sheehan's complaints and in "any case about the grant of the typist's allowance" and Eurocontrol's comments of 3 May 1995 on that application;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Article 13, paragraph 1, of its Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As was said under A in Judgments 1403 (in re Tejera Hernandez) and 1411 (in re Bidaud), Rule No. 7 of the Rules of

Application of the Staff Regulations provides in Article 4a of Section 2a:

> "An official in category 'C' employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance.
>
> The amount of this allowance shall be fixed under the conditions laid down in Article 65 of the Staff Regulations.
>
> The rates provided for in paragraph 1 of this Article shall be as follows:
>
> - BF 3,710 per month for officials in grades C4 or C5;
> - BF 5,687 per month for officials in grades C1, C2 or C3."

The complainants are all clerical staff in category C at Eurocontrol's Experimental Centre at Brétigny-sur-Orge, in France. Mrs. Roelofsen joined the Agency in 1973 and holds a grade C2 appointment as a clerical officer. Miss Sheehan and Mr. Drogoul, who joined in 1991, are clerical assistants at grade C5.

In a letter of 14 May 1992 the Director of Personnel and Finance of Eurocontrol informed the Director of the Centre that "a survey [would be] conducted concerning the grant of the allowance to certain grade C officials whose duties involved not only typing or secretarial work". For such staff to qualify for the allowance their duties must include the use of a typewriter for three-fifths or of a computer keyboard for half of their working time.

On 7 July 1992 Mrs. Roelofsen's first-level supervisor wrote a minute stating that she spent over four-fifths of her working time using a computer. On the same day Mrs. Roelofsen applied for the allowance through official channels. Miss Sheehan applied for it on 20 July and Mr. Drogoul on 3 November 1992.

On 31 July 1992 the Director of the Centre sent the Director General of Eurocontrol a "list of the staff at the Centre entitled to the allowance". Mrs. Roelofsen and Miss Sheehan were on the list.

On 7 February 1994 the Director of Personnel saw several staff members who were not to get the allowance, and they included the complainants. On 10 February they each sent in a new application for the allowance under Article 92 of the Staff

Regulations. Mr. Drogoul wanted payment as from 16 October 1991, the date at which he had joined the Agency, Miss Sheehan as from 4 November 1991 and Mrs. Roelofsen as from 7 July 1992.

In a "summary table" of 6 May 1994 the Director of the Centre advised against granting the allowance to the complainants on the grounds that they did not qualify.

Having got no reply to their applications within the time limit of four months prescribed in Article 92 of the Staff Regulations, the complainants wrote to the Director General on 13 and 22 June lodging internal "complaints". By letters of 11 July 1994 the Director of Personnel rejected their "complaints" on the Director General's behalf. Those are the decisions they are challenging.

B. The complainants distinguish between their applications of July and November 1992, which they made in the context of the general survey on the grant of the allowance, and those of February 1994, which they filed under Article 92 of the Staff Regulations.

They have three pleas. They submit first that since 1965 the Agency's constant practice has been to grant the allowance to clerical staff meeting the requirements set out in A above; by excluding them it is in breach of patere legem quam ipse fecisti. Secondly, Eurocontrol had a duty to reply to their first applications. Thirdly, they plead breach of equal treatment: colleagues in a position akin to theirs have been granted the allowance.

They ask the Tribunal to quash the decision of 11 July 1994; to order the Agency to pay them the allowance as from the date of their first applications, with interest on arrears at a rate to be fixed. They seek costs.

C. In its replies the Agency submits that the complaints are irreceivable. The complainants failed to appeal against the implied rejection of their applications of July 1992. They are out of time, and their attempt to get round the time limit by applying again in February 1994 is to no avail because their claims are the same.

The Agency's arguments on the merits are subsidiary. It submits that the complainants misunderstood the purpose of the survey announced in the letter of 14 May 1992, which "was not to elicit new applications for the allowance". It points out that under the rules it has no obligation to grant the allowance to clerical staff but may do so exceptionally. There is, it says, no established practice in the matter.

Besides, the complainants did not qualify for the allowance when they joined the Agency. Nor do they now, since their duties have not changed. They do mainly technical work and spend precious little time on typing. On 6 May 1994 the Director of the Centre declared that none of them qualified; so their plea of discrimination is mistaken.

D. In their rejoinders the complainants maintain that their complaints are receivable, since their applications of July and November 1992 did not come under Article 92 of the Staff Regulations. They contend that the purpose of the survey announced in the letter of 14 May 1992 was to determine how many of those who had not yet had the allowance were "likely" to get it. The Agency did have an established practice of granting the allowance to clerical staff, and that they do spend much time either typing or on a computer terminal. They press their plea of discrimination.

E. In its surrejoinders the Agency maintains all its arguments: the complaints are irreceivable and it has never granted the allowance to clerical staff like the complainants, whose duties are technical and operational.

CONSIDERATIONS:

1. Mrs. Roelofsen joined Eurocontrol on 1 July 1973, Mr. Drogoul on 16 October 1991 and Miss Sheehan on 1 November 1991. They are employed in category C at its Experimental Centre at Brétigny-sur-Orge. On 14 May 1992 the Director of Personnel told the Director of the Centre that there was to be a review of the grant of the "typist's allowance", a fixed allowance provided for in Article 4a of Section 2a of Rule No. 7 of the Rules of Application of the Staff Regulations. It is paid to certain officials in category C who do not perform only the duties of a typist or secretary. By letters dated 7 and 20 July and 3 November 1992 the complainants each applied for the allowance. Having got no answer, they made new "requests" on 10 February 1994 for the same purpose. After waiting four months for a reply they lodged "complaints", on 13 and 22 June 1994, under Article 92(2) of the Staff Regulations. The Director General rejected them in three identical letters of 11 July 1994. Those are the decisions under challenge.

2. Though the complaints are distinct, they raise the same issues of fact and of law and seek the same redress and may therefore be joined to form the subject of a single judgment.

3. The Organisation submits that the complaints are irreceivable on the grounds of failure to exhaust the internal means of redress. It observes that Mrs. Roelofsen and Miss Sheehan submitted to the Administration letters claiming the allowance in July 1992, and Mr. Drogoul did so in November 1992, their purpose being to get decisions from the Director General. Eurocontrol argues that those letters were "requests" within the meaning of Article 92(1) of the Staff Regulations. The Director General had four months in which to reply, and after that period the absence of replies implied decisions to reject their claims. Eurocontrol submits that under 92(2) the complainants then had three months in which to appeal, starting at the end of the four months. So they had to act no more than seven months after they had first claimed the allowance, i.e. by February 1993 in the case of Mrs. Roelofsen and Miss Sheehan and by June 1993 in that of Mr. Drogoul. But, the Agency points out, they took no action at all until 10 February 1994, when they lodged "complaints" with the Director General on the grounds that he had failed to provide a "specific reply" to their earlier claims.

4. Eurocontrol's plea is sound. As was held in Judgment 398 (in re Mager) under 1 and 2:

> "1. Article 92.1 of the Staff Regulations provides that any person to whom the Staff Regulations apply may submit to the Director General what is termed a 'request' that he take a decision. The Director General shall give reasons for his decision and notify it to the official within four months from the date on which the 'request' was made. If by the end of that period no reply to the 'request' has been received, that shall be deemed to constitute an implied decision to reject it.
>
> Article 92.2 further provides that any person to whom the Staff Regulations apply may submit to the Director General what is termed a 'complaint' against an act adversely affecting him, either where the Director General has taken a decision or where he has failed to adopt a measure prescribed by the Staff Regulations. The 'complaint' must be lodged within three months, starting on the date of publication of the act if it is of a general nature or on the date of notification of the decision to the person concerned or the date on which it comes to that person's attention, or, where the 'complaint' concerns an implied decision to reject a 'request', on the date of expiry of the period prescribed for reply. The Director General shall again give reasons for his decision and notify it to the official within four months from the date on which the 'complaint' was lodged. Failure to reply within that period shall be deemed to constitute an implied decision to reject the 'complaint'.

> 2. The scope of Article 92.1 is limited by that of Article 92.2: a 'request' may be made only where a 'complaint' may not. Any other construction would make it pointless to lodge a 'complaint'. More particularly, the three-month time limit for lodging a 'complaint' set in Article 92.2, would serve no purpose if at any time a 'request' might be submitted to the Director General instead."

So any letter asking the Director General to take a decision must be treated as a "request". Any decision of the Director General's, be it implied or not, to reject that request must be challenged in a "complaint" within the prescribed period. No later 92(1) request whose purpose is the same may be allowed.

5. The conclusion is that the complainants, who lodged no timely "complaint" against the implied rejection of their "request", may not put their case directly to the Tribunal because they thereby failed to exhaust the internal remedies available to them.

6. The further requests they put to the Director General on 10 February 1994 were intended, like those they had made in 1992, to get decisions from him on the grant of the allowance. So what they were trying to do was to set off a new time limit after they had let the one for filing internal "complaints" expire. Those requests and the ensuing action, including the present complaints, are therefore irreceivable.

7. Mrs. Guérin, an official who also belongs to category C, has applied to intervene in Mrs. Roelofsen's and Miss Sheehan's complaints and, more generally, in "any case about the grant of the typist's allowance". Since the complaints she identifies by name are irreceivable so is her application to intervene in them.

8. She gives no particulars of any other "case about the grant of the typist's allowance", and the Organisation contends that on that score her application is "inapposite". In its submission the allowance is an exceptional payment and Article 4a of Section 2a of Rule 7 applies by analogy and on the merits of each case.

9. Mrs. Guérin has indeed offered no factual evidence to show that her duties entitled her to the allowance. She merely says that she is in the same position as Mrs. Roelofsen and Miss Sheehan. She neither shows nor even seeks to show that she is in the same position in fact and in law as others who are claiming the allowance in complaints to the Tribunal. So her application is again irreceivable.

DECISION:

For the above reasons,

The complaints and the application to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas E. Razafindralambo P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANIZATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re WEBER **Judgment 1463**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pascal Weber against the European Patent Organisation (EPO) on 20 May 1994, the EPO's reply of 26 August, the complainant's rejoinder of 6 September and the Organisation's surrejoinder of 17 November 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman born in 1960, took up duty with the EPO at grade A1 on 1 January 1985 at Directorate-General 1 (DG1) of the European Patent Office, the secretariat of the EPO, at The Hague. On 1 April 1986 he was promoted to grade A2. He was transferred as a patent examiner to Directorate-General 2 (DG2) at Munich on 1 September 1988.

His performance in the period from 1 January 1988 to 31 December 1990 was rated 2 ("very good"). By 1 April 1991 he completed seven years' professional experience, the minimum necessary for promotion to grade A3. Before making a recommendation the Promotion Board wished as usual to be satisfied that he had been keeping up his performance. So it asked for an ad hoc report on his work from 1 January to 30 June 1991. He signed the report on 26 August 1991 and it gave him a 3 ("good"). He got another 3 in a second report for the first eleven months of 1991, which he signed on 5 December 1991 and which the representative of the President of the Office endorsed on 12 January 1992.

The Promotion Board did not recommend promoting him to A3 in 1991.

His promotion took effect only at 1 January 1992. But he believed that he qualified for promotion at 1 April 1991 and therefore asked for "review" of his case in a letter of 14 February 1992 to the chairman of the Appeals Committee. On 27 February he explained that his letter had really been intended for the chairman and members of the Promotion Board.

By a letter of 21 April the Principal Director of Personnel told him that the Promotion Board would not entertain an appeal from a staff member about promotion and that, though the President had asked the Board to reconsider, it still declined to recommend promoting him in 1991.

On 21 July 1992 he lodged an appeal with the Appeals Committee. He entered a brief on 26 August 1993. In its report of 7 January 1994 the Committee unanimously recommended rejecting his appeal. By a letter of 21 February - the decision he is challenging - the Director of Staff Policy informed him of the President's endorsement of that recommendation.

B. The complainant objects to the process of reporting on staff and of promotion at the EPO. He points out that the Promotion Board meets late in the year to look at the whole batch of applications for promotion from staff who qualify for it by seniority in the course of that year. And their performance is ordinarily expected to be as good at the date of promotion as it was on completion of the qualifying period. He has two pleas.

One is that there is breach of equal treatment. Someone who completes the seven years' experience at the start of the year fares less well than someone who does so at the end. For the latter to get promotion performance does not have to be rated "very good" for so long since the Promotion Board needs no ad hoc report to make a recommendation. But the complainant's performance had to be rated "very good" also in the further period covered by the ad hoc report.

Secondly, the demand for an ad hoc report makes the whole process arbitrary. The quantity and quality of a patent examiner's work over a period will depend on such things as the difficulty of the files and the number of days off work. Someone may well qualify for promotion at one date but not at another, and it is the Promotion Board that determines at discretion the period to be covered by the report.

In any event the rating "good" he was given in the ad hoc report overlooked the exceptional circumstances which caused him to be off work for many days and so have a lower output in the first half of 1991. The decision not to promote him at 1 April 1991 was due to misappraisal of the facts.

Favourable comment by the countersigning officer in the second report for 1991 misled him; had it not been there he would no doubt have objected to the report.

He asks the Tribunal to quash the decision of 21 February 1994 and order his promotion to A3 at 1 April 1991.

C. In its reply the Organisation submits that the complainant may not properly challenge the system of reporting and of promotion unless it has caused him injury.

There are no ad hoc reports any more; it is nevertheless quite proper to check that someone who qualifies for promotion has kept up performance until the Promotion Board makes its recommendation. The ad hoc report was warranted in the complainant's case because he had not completed the seven years' professional experience until 1 April 1991, and his last report had been about 1990.

His second report for 1991, which the Promotion Board had when it reviewed his case, shows that the assessment of him in the ad hoc report was due, not to the choice of the period covered, but to a drop in his output.

The countersigning officer's comments are not binding on the Promotion Board. A line of precedent says that promotion is not a right. Besides, the complainant was promoted to A3 at 1 January 1992 although someone with a general rating of only 3 has to complete eight years' professional experience and he did not do so until 1 April 1992.

D. In his rejoinder the complainant presses his objections to the system of reporting and promotion. In his submission it is deceitful, unfair and in breach of its contractual obligations for the EPO to refuse promotion on the strength of a report covering some arbitrarily chosen period when performance has till then been up to scratch.

Over and above his earlier claims he seeks awards of 2,000 German marks in moral damages and of another 2,000 in costs.

E. In its surrejoinder the Organisation again points out that no-one has any right to promotion; so contractual obligations are irrelevant.

The President has discretion to take criteria other than the minimum requirements. That is why he chose to promote only those whose performance had kept up until the date of the Promotion Board's recommendation.

CONSIDERATIONS:

1. The EPO employs the complainant as a patent examiner. He held grade A2 from 1988. He found that he was not on the list of promotions of examiners to grade A3 in 1991. In the belief that he qualified for such promotion he wrote the chairman of the Promotion Board a letter on 14 February 1992 asking for review of his case. By a letter of 21 April 1992 the EPO told him that after carrying out such review on the instructions of the President of the Office the Board had upheld its recommendation against promoting him in 1991. He filed an internal appeal but on 7 January 1994 the Appeals Committee recommended rejecting it. The President's endorsement of that recommendation on 21 February 1994 is the decision impugned.

2. The original complaint claims the quashing of the impugned decision and promotion to grade A3 at 1 April 1991. The rejoinder makes further claims, to awards of 2,000 German marks in moral damages and of another 2,000 in costs.

3. According to consistent precedent promotion is at the appointing authority's discretion. That is the general rule, it applies even in the absence of written rules, and it is reflected in Article 49(7) of the EPO's Service Regulations, which says that promotions are "by selection" from among permanent employees with the proper qualifications. That entails assessment of each applicant on merit and comparison with the others. The Tribunal will exercise only a limited power of review over a decision on whether to grant promotion and will not interfere unless it finds one of the few fatal flaws that it listed, for example, in Judgment 1137 (in re West No. 11) under 2. The flaws are that the decision was taken *ultra vires*, shows some formal or procedural irregularity, overlooks a material fact, draws a wrong conclusion from the evidence, rests on an error of fact or of law, or amounts to abuse of authority. Those criteria hold good where, before taking decisions, the appointing authority lays down general rules and notifies them to the staff. The lawfulness of such rules is again subject to only limited review by the Tribunal. But the appointing authority is bound - *patere legem quam ipse fecisti* - to abide by the rules that it has itself issued and that have the force of law. So any breach of them will constitute a fatal flaw in the impugned decision.

4. In support of his objections to the decision not to promote him the complainant puts forward pleas that come under two heads: the breach of equal treatment that is inherent in the EPO's system of reporting and promotion, and misappraisal of the facts.

The system of reporting and promotion

5. The complainant's objections to the reporting and promotion system rest, first, on the principle of equal treatment. He says that that principle requires an organisation to treat likewise everyone on its staff who is in like position in fact and in law. He offers the example of two officials whose work is rated equally good but who complete at different dates the minimum period of reckonable experience required for promotion. As things stand, he argues, one of them may have to keep up the standard of his performance for up to 12 months longer than the other. That is an inherent flaw, even though the President may remove it by applying additional criteria.

6. One preliminary remark is that what the complainant is contending is that the system is misconceived, not misapplied. There is nothing wrong with the President's applying the rules correctly.

7. The complainant offers the academic example of two officials performing the same duties for exactly the same length of time. But those are not the only factors that the President takes into account. The President may apply other criteria, and they include age and length of service. The complainant's abstract reasoning is therefore unconvincing. To show breach of the principle of equal treatment comparison must be drawn between identified staff members in specific circumstances.

8. In the internal appeal the complainant compared his case with that of another staff member he actually named. But that comparison is no more telling. In submissions he put to the Appeals Committee he sought to show that his position was akin to that of his colleague, who was promoted to grade A3 in 1991. And that was again his only plea in his appeal of 26 August 1993. But in this complaint he merely cites the comparison, and in vague terms at that. In any event, the EPO's reply gives information which it says goes to show that the other official's work was better and to explain why it treated him better. There is no evidence to cast doubt on the EPO's case, and the complainant does not contest it. So there is no question of any breach of the principle of equal treatment.

9. The complainant seeks to show the unlawfulness of the system of drawing up ad hoc reports at the Promotion Board's bidding. The purpose of such reports is to determine whether the performance of a candidate for promotion is still as good as it was at the time of his latest appraisal report. In the case of the complainant that meant finding out whether he had kept up in the first half of 1991 the quality of performance he had shown in 1990.

10. He submits that what makes ad hoc reports unlawful is the arbitrariness they introduce into the criteria for promotion. Sundry factors affect the quality of an examiner's work and it is "subject to periodic variation". The result, he says, is that a candidate who meets the conditions laid down during the period set by the Promotion Board gets promoted however good a job he may have been doing at another point in time. The Tribunal will not entertain the plea, which relates, not to any actual dispute, but to potential and hypothetical cases. It may not make general rulings in anticipation of a dispute.

11. It will, however, take up the complainant's contention that the Promotion Board ought to have checked the assessment of his performance at the date of the Board's own meeting. As the complainant himself acknowledges, time is needed to let the reporting officer draft the report and put it to the countersigning officer and the Board. So the Tribunal is not in a position to say in the Board's stead when the information available suffices for it to make up its mind. In any event the complainant suffered no injury on account of delays in the procedure, which do not affect the date of promotion. That date is for the Board to determine from case to case. As a matter of fact the complainant himself was later promoted to A3 as from 1 January 1992, though he did not complete until 1 April 1992 the eight years' experience required of someone whose general rating was "good". So he has actually gained from the system he is objecting to.

12. So his plea fails: there is no flaw in the reporting and promotion system, be it the making of ad hoc reports or breach of equal treatment.

The appraisal of the evidence

13. The complainant's second plea is that the Organisation wrongly assessed his performance. He contends that, even supposing it was lawful to have an ad hoc report made on his performance in the first half of the year, it should have been rated "very good".

14. Several judgments say that a decision on a staff report, being a discretionary one, may be set aside only on limited grounds such as a mistake of fact or of law or failure to take account of some material fact: see for example Judgments 724 (in re Hakin No. 6), 806 (in re Hakin No. 8) and 1144 (in re Maugain No. 6). The complainant alleges that the Organisation disregarded the unusual circumstances that caused him to be off work for 41.2 per cent of the time in the period in question. His reporting officer, the director of the unit, explained that at length in the report for 1991, and his

countersigning officer acknowledged his difficulties by stating in the report "I consider his 'good' to lie towards the top end of this margin" and "Mr. Weber is recommended for a promotion to A3".

15. The plea is unsound both in fact and in law. The text of the ad hoc report shows that though the author did take account of the complainant's absence to attend courses at Strasbourg he still rated his performance only "good", albeit "towards the top end". The next report, for the first eleven months of 1991, included comments on the circumstances that had made the year "rather difficult" for him and gave him the same rating. The Promotion Board's recommendation took full account of those comments, which, contrary to what the complainant says, were not in the least vague. By endorsing that recommendation the President took the view that the promotion was unwarranted and he thereby exercised his discretion. The decision shows no formal or substantive flaw and it must stand.

16. Since the complainant fails in his main claim, to the quashing of the impugned decision, his claims to moral damages and costs are also disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas E. Razafindralambo P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re NINDORERA

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Languide Nindorera against the World Health Organization (WHO) on 30 September 1994 and corrected on 20 October 1994;

Considering that by a letter of 14 January 1995 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that in its letter of 15 February to the Registrar the Organization expressed no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot Mella Carroll

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANIZATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-NINTH SESSION

In re SALARD

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint which Mr. Jean-Claude Salard filed on 26 September 1994 and corrected on 27 September, against the European Organisation for the Safety of Air Navigation (Eurocontrol), Eurocontrol's reply of 16 December 1994, the complainant's rejoinder of 6 March 1995 and the Organisation's surrejoinder of 28 April 1995;

Considering that by a fax of 2 May 1995 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit and that the Organisation, when invited by the Registrar to comment, declined to do so;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas Michel Gentot Mella Carroll

A.B. Gardner

ISSN 0378-7362

If this address is wrong, please return this sheet to the sender or, at least, the part bearing the address.

Pour tout changement d'adresse, prière de renvoyer à l'expéditeur cette feuille ou, du moins, la partie comportant l'adresse.

Sírvase indicar el cambio de dirección del destinatario y enviar esta hoja al remitente, o al menos la parte en que está escrita la dirección.

INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO
CH-1211 GENÈVE 22

P. P.
1211 GENÈVE 22